No. 18,257

IN THE

United States Court of Appeals

For the Ninth Circuit

RAYTHEON COMPANY, a corporation,
Appellant and Cross-appellee,

vs.

RHEEM MANUFACTURING COMPANY, a corporation, and RHEEM SEMICONDUCTOR CORPORATION, a corporation,
Appellees and Cross-appellants.

Brief of Rheem Manufacturing Company and Rheem Semiconductor Corporation as Appellees and Opening Brief as Cross-Appellants

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Invoking the diversity jurisdiction of a federal court on what is purely a contract case controlled by California law (*Erie R. R. Co. v. Tompkins,* 304 U.S. 64), plaintiff Raytheon Company

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All emphasis in quotations in this brief has been added unless otherwise noted.

The record is in 6 volumes. Vol. I is paged from 1 to 136. Volumes II through VI are reporter's transcripts, and, since the paging begins again in Volume II, we shall refer to pages in Vol. I as "R. ", and to pages in Vols. II-VI as "R. Tr. ".

(hereafter called "Raytheon") sued defendants Rheem Manufacturing Company and Rheem Semiconductor Corporation for declaratory relief. It now appeals from most of the judgment. So far as the portions from which it appeals are concerned, this is a fact case controlled by the findings of fact which are fully supported by the evidence. Consequently, Raytheon's appeal seeks to substitute this Court for the trier of the facts. For example, not only does it ask the Court to draw factual inferences from the record contrary to those of the District Court,[1] but it states as fact its own witnesses' versions of conversations and occurrences although the District Court accepted a different version given by appellees' witnesses. Our own statement of the case is therefore in order.

STATEMENT OF THE CASE

A. The Facts.

The issues in this case are issues of interpretation of a lease from Rheem Semiconductor Corporation to Raytheon dated November 30, 1961 made pursuant to a contract between them dated November 1, 1961.[2]

1. PROPER DESIGNATION OF THE PARTIES.

Raytheon's brief refers to Rheem Manufacturing Company as "Rheem". This is both confusing and misleading. It is confusing because the contract and lease use "Rheem" to designate Rheem Semiconductor Corporation (see R. 10), and in the key passages from those instruments quoted extensively in Raytheon's brief

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1. Drawing inferences of fact is the province of the trial court. Such inferences are themselves fact, and findings thereon are, like any other findings, controlling unless clearly erroneous. *United States v. Fotopulos,* 180 F.2d 631, 635 (9 Cir.); *Walling v. General Industries Co.,* 330 U.S. 545, 550; *Widney v. United States,* 178 F.2d 880, 884 (10 Cir.).

2. The contract is referred to as the "basic contract", and Exhibit 1 to the complaint is a copy. A form of the lease is attached as Exhibit B to the basic contract. A lease in that form was later executed as a separate document (R. Tr. 203, 204), but the copy referred to by the parties in this litigation is the form attached to the complaint at R. 53-60.

(at pp. 7-9) "Rheem" is used in that sense. It is misleading because the essence of Raytheon's appeal is an effort, however phrased, to disregard the corporate entity of Rheem Semiconductor Corporation as separate and distinct from Rheem Manufacturing Company. In this brief we shall refer to Rheem Manufacturing Company as "Manufacturing" and to Rheem Semiconductor Corporation as "Semiconductor".

2. RAYTHEON CONTRACTED WITH SEMICONDUCTOR AS AN ENTITY DISTINCT AND SEPARATE FROM ~~SEMICONDUCTOR~~ Manufacturing.

The starting point is that Raytheon with full knowledge of the facts deliberately contracted with Semiconductor as a corporate entity distinct and separate from Manufacturing.

Semiconductor is a California corporation (R. 2) formed in 1959 (R. Tr. 463) to manufacture certain electronic devices with a plant at Mountain View, California. As organized, about 60% of its stock was owned by Manufacturing and 40% by certain scientific employees of Semiconductor known as the Baldwin Group. In 1960 negotiations between Manufacturing and Raytheon explored various business relationships and in 1961 explored purchase by Raytheon of Manufacturing's stockholdings in Semiconductor (R. Tr. 240, 241; also 61, 62). At the outset Raytheon was told the exact situation as to ownership of Semiconductor's stock, shown the stock records and the state of the accounts between Semiconductor and Manufacturing disclosing the moneys advanced by and owing to the parent (R. Tr. 242, 243; also 84). For reasons of its own, Raytheon decided not to deal with Manufacturing or to buy the shares but, beginning in September, 1961, to deal with Semiconductor for purchase of its assets (R. Tr. 63). Raytheon regarded employment of the Baldwin Group as a necessary condition of any deal (R. Tr. 84), and it was told that before a contract was entered into Manufacturing would acquire the stockholdings of the Baldwin Group, and before the basic contract was executed was told that Manufacturing had done so and owned 99.9% of Semiconductor's stock (R. Tr. 242,

243; also 84). With this full knowledge, Raytheon contracted with Semiconductor as a distinct and separate corporate entity. The testimony of Raytheon's officials to this effect is set out at pp. 35, 36, infra, and the District Court found (Finding 19, R. 161):

> "On and before the Basic Contract was entered into Raytheon was informed and knew that Rheem Manufacturing owned practically all of Rheem Semiconductor's stock but nevertheless contracted with Rheem Semiconductor as a distinct and separate corporate entity."

3. THE COURSE OF NEGOTIATIONS WITH RESPECT TO PRICE.

It was Raytheon's private purpose to try to acquire Semiconductor's essential assets for less than half their current book value[3] (R. Tr. 87). Semiconductor and Raytheon readily arrived at a price for Semiconductor's inventory, which is no part of the controversy. As to Semiconductor's fixed assets, consisting of equipment installed and operating as a full plant, the negotiations took the following course.

Those assets had been acquired between 1959 and the date of the contract, some in 1961 (R. Tr. 463), and had a book value as of June 30, 1961 of $2,177,088 (D. Ex. O, R. Tr. 453, 454). Semiconductor offered these assets to Raytheon at 90% of their book value, or $1,959,300 (R. Tr. 244). Raytheon rejected that offer and made a counteroffer of $850,000, which Semiconductor rejected out of hand (R. Tr. 96).

Meanwhile, Raytheon sent a team of accountants, a lawyer, and scientific men to Semiconductor's plant at Mountain View where they spent two weeks (R. Tr. 163, 462, 468), and Raytheon compiled a list of certain of the assets (R. Tr. 156, 157) of a book value of $941,141 (D. Ex. O). Semiconductor and Raytheon agreed to Raytheon's purchase of this list for $881,000 (R. Tr. 96, 97, 237). These assets have been called the "A List" or the "List A" assets.

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3. Cost less depreciation.

Semiconductor renewed its offer of the remaining assets, which have been called the "List B" or "B List"[4], to Raytheon at 90% of book value, and this Raytheon rejected (R. Tr. 97), offering in turn 30% of book (R. Tr. 100-102). It justified this absurdly low offer by stating that it had no use for these assets, that it had just bought the assets of Columbia Broadcasting System Electronics Company (hereafter called CBS) for less than 30% of book value and had all kinds of duplicate equipment as a result, and it belittled both the value and its need for the List B assets.[5] Semiconductor rejected this offer of 30%. Raytheon's chief negotiator (Oldfield) told Semiconductor's chief negotiator (Mallatratt):[6]

> "that there was no question but that these assets, so far as he could tell, might properly be worth the value that was shown on the book value to someone, but because of the excess of available assets from others, it was not worth that figure to Raytheon Company." (R. Tr. 246)

Oldfield suggested that Raytheon lease the List B assets for 6 months to evaluate them. But he said that he could not see that Raytheon then or later would be interested in buying any significant amount (R. Tr. 246), that "it would be much easier to proceed in these negotiations if we would not attach any significant value" to them (R. Tr. 245), and, in effect, that Raytheon would be doing Semiconductor a favor should it buy any of List B at a distress price (R. Tr. 238).

Privately, Raytheon considered items on the B list as essential, some very important (R. Tr. 69, 160, 161, 169, 170). Processes

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4. The meaning of "A List" and "B List" was stipulated (R. Tr. 140).

5. Raytheon had in fact just bought CBS's semiconductor equipment (R. Tr. 69) for less than 30% of book (R. Tr. 100, 101). Mr. Oldfield, Raytheon's vice-president and chief negotiator (R. Tr. 60, 61) and the man who signed the basic contract for it (R. Tr. 81) told Semiconductor's negotiator that due to the CBS acquisition List B would be surplus (R. Tr. 514).

6. Mr. Mallatratt, Semiconductor's Treasurer (R. Tr. 203) was its chief negotiator (R. Tr. 361, 513), assisted by Mr. Stroup (R. Tr. 483, 484).

at the Mountain View plant were different from those at Raytheon's East Coast plants, and the operations at Mountain View required specialized equipment (R. Tr. 170, 171). The Mountain View plant was beautifully adapted to its purpose, it had taken a considerable degree of sophisticated engineering and scientific judgment to design it, its processes were advanced (R. Tr. 319, 320). Mr. Oldfield admitted at the trial that the B list equipment had been especially adapted to operations at Mountain View and many of the items were required for production there (R. Tr. 106).

During the negotiations in October 1961, shortly before the contract was signed, Mr. Mallatratt heard a rumor that one of Raytheon's officials had boasted that Raytheon had "rooked" CBS and that what it had done to CBS was nothing compared to what it was going to do to Semiconductor. Mr. Mallatratt spoke about this to Mr. Oldfield, half jocularly, half seriously, and Mr. Oldfield denied the rumor (Oldfield, R. Tr. 65). Later events brought this rumor back to mind (see p. 12, infra).

4. THE LEASE, THE OPTIONS, AND THE SUBSTITUTION CLAUSE.

The parties then inserted into the contract a provision that Raytheon would lease the List B assets for six months from December 1, 1961 (Art I, Sec. 2(a), R. 12; Lease, R. 53). Prior to May 15, 1962, Raytheon would have the option to buy any of the leased assets at a price to be agreed between the parties, or, failing agreement, at either 90% of the June 30, 1961 book value or the fair market value as appraised by American Appraisal Co., whichever was *lower.* A semi-final draft of the contract prepared on October 26, 1961 by the attorneys for the two sides (R. 363) contained a clause committing Raytheon to buy at least $250,000 of the leased assets, but a day or two before execution[7] Raytheon said that *it did not want to be committed* and asked that this clause go out, and it was deleted (R. Tr. 364).

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7. The basic contract was executed on November 4, 1961 (R. Tr. 361).

Thus Raytheon remained endowed with an option but free of any commitment. Raytheon's efforts throughout were, as we shall see, to put itself in a position where Semiconductor would be bound while Raytheon had rights without commitments.

As part of the hard bargain Raytheon was driving, it obtained a right of substitution (Basic Contract, Art I, Sec. 2(b), R. 12). Under it, until December 15, 1961, Raytheon could substitute for any item on the A list, which it had bought, an item on the B list of the same or greater book value.

Semiconductor realized that it needed some protection against what would otherwise be a wholly one-sided contract. Without more, Raytheon's right of substitution and option to buy could leave Semiconductor unprotected to Raytheon's rapacity, if rapacious Raytheon should prove to be. With the right of substitution, should Raytheon find that it did not want any item it had bought, or did not want it at the price it had agreed to pay, or that it had declined in value,[8] or if it found choice items on the leased list that it preferred, it could substitute, thereby insuring that it obtained the choicer items and relegating the supplanted items to the B list. Then, with its option it might still pick up the supplanted items for less than 90% of book value although it had originally agreed to buy them at that price, and it could "skim the cream" or "cannibalize" the B list. Until May 15, 1962 it could select out key pieces of equipment, or break up full lines of equipment. The remainder could be of depressed worth to an outside purchaser to whom they would be but odds and ends. But to Raytheon they would not be odds and ends but part of a complete installation at the Mountain View plant and of utmost value. By exercise of the option, if unqualified, Raytheon might thus place itself in a position of being able to compel Semi-

8. Electronics technology develops so fast that equipment could become obsolete rapidly (R. Tr. 193).

conductor to sell to it for a song while consistently committing itself to buy nothing.[9]

Consequently, Semiconductor asked for a further provision in the lease, a provision that if during the first 90 days of the lease term (i.e., until March 1, 1962) Semiconductor should have received an offer for any items of the leased property, Raytheon's option would be *limited* to the right, within 5 days of notice, to purchase the items at the price specified in the offer, and, in the event Raytheon should not exercise this right of first refusal, Semiconductor would be free to sell the items to the offeror at the offered price. This was agreed to.

It was fully understood at the time that Manufacturing might make an offer to Semiconductor for items on the B list. It had been negotiating with Japanese interests to set up a semiconductor division in Japan, possibilities for use in Greece were considered, and inquiries had been received from Stanford Research Institute about acquiring a full line of equipment (R. Tr. 212-214, 217, 233, 254). During the negotiations Mr. Mallatratt had told Mr. Oldfield and Mr. Kather, another vice-president of Raytheon, General Manager of its semiconductor division and one of its negotiators (R. Tr. 81, 139), about these possibilities of use of the equipment (R. Tr. 134, 135). Before the basic contract was executed and during "the discussion concerning the term of the lease and the right of first refusal" Mr. Mallatratt also told Mr.

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9. The District Court spontaneously saw the significance. For example, it commented (R. Tr. 259):

> "THE COURT: Mindful of the intensity of the volatile nature of the particular industry, what would occur if an item should prove to be antiquated or otherwise supplemented by some new advance in the industry to the extent that—let us take Item X, for the purpose of illustration. Let us assume that Item X, mindful again of the volatile nature of this particular industry, became or was superseded by some advance in the science of the arts, then could there be a substitution under A and relegated to B?"

Again (R. 261): "Where was the gamble from Raytheon's viewpoint if they could make substitutions willy-nilly?"

Kather and Mr. Oldfield that Manufacturing itself might make an offer to Semiconductor for some of the List B assets (R. Tr. 515), and either Oldfield or Kather acknowledged that they understood that Manufacturing might do so (R. Tr. 516). Then, at one of the last negotiating meetings, Mr. Mallatratt and Mr. Stroup explained to Kather that they hoped to establish "a number of manufacturing lines abroad in various countries" and "Mr. Kather made the remark that now he understood why we chose to keep the surplus assets rather than dispose of them at a low price." (R. Tr. 517)

Immediately before the contract was executed, Raytheon's counsel in a telephone call concerning various details asked that the word "bona fide" be inserted before the word "offer" in the first refusal clause without stating that there was any purpose to preclude a possible offer by Manufacturing (R. Tr. 365). The words were inserted, so that as executed Section 12 of the lease prescribed the right of first refusal thus (R. 57):

> "12. *Right of First Refusal:* In the event that, during the first ninety (90) days after the commencement of the term of this Lease, Lessor shall have received a bona fide offer for any item or items of the Leased Property, Lessee shall have the right within five (5) business days from the date on which notice of such offer (specifying the price or prices offered) is communicated to Lessee at its Mountain View plant facility to purchase from Lessor such item or items of the Leased Property at the price or prices, as the case may be, specified in such offer. In the event Lessee exercises such right, the item or items of Leased Property shall be conveyed to Lessee by Lessor. In the event that Lessee does not exercise such right within such five (5) business days or indicates its desire not to so exercise, Lessor shall have the right to sell, subject to the remaining term of this Lease, such item or items to the party making such offer at the price or prices, as the case may be, offered by such party as set forth in said notice."

The Trial Court found (Finding 21, R. 161):

> "21. During the negotiation of the Basic Contract and the lease and prior to their written execution Raytheon was informed by Rheem Manufacturing and Rheem Semiconductor that Rheem Manufacturing might make an offer to Rheem Semiconductor during the term of the lease for some of the leased assets. The words 'bona fide' appearing before the word 'offer' in paragraph 12 of the lease quoted above were thereafter added at the request of Raytheon, after the Basic Contract had been executed, by an agreement of additions and corrections without any advice by Raytheon that its purpose was to preclude an offer by Rheem Manufacturing. Raytheon did not intend by those words or otherwise to preclude an offer by Rheem Manufacturing to Rheem Semiconductor, and Rheem Semiconductor did not by agreeing to include those words, or otherwise, intend to preclude itself from receiving or accepting an offer from Rheem Manufacturing."

5. RAYTHEON'S EXTENSIVE EXERCISE OF THE RIGHT OF SUBSTITUTION AND THE CONSEQUENT SITUATION CONFRONTING SEMICONDUCTOR IN JANUARY 1962.

The contract gave Raytheon until December 15th to exercise its right of substitution. Before December 15th Mallatratt, at Oldfield's request, granted an extension of that time.[10] When the substitutions were completed in January 1962 their *extent was a shock to Semiconductor.* As much as 30% of the List A items, which

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10. Raytheon's witnesses denied that there was any such extension, but Mr. Mallatratt testified that there was (R. Tr. 248, 249), as did Mr. Stroup (R. Tr. 518). And in his deposition taken a few days before the trial Mr. Oldfield admitted that an extension had been granted (R. Tr. 104), and that Raytheon was exercising the right of substitution into January 1962 (R. Tr. 104). Obviously all conflicts on relevant matters have been resolved by the judgment against Raytheon. And the documents show that substitution was in fact not completed until well in January. A wire of December 15, 1962 contained errors (R. Tr. 332), a correcting wire was sent on December 21st (R. Tr. 333), a revised List A was sent on December 28th (R. Tr. 328-333) but this erroneously contained many items never on the B list (R. Tr. 340, 341), the matter was not clarified for some time (R. Tr. 340), and not until January 20, 1962 did Mr. Mallatratt and Mr. Oldfield finally agree on the final substitution list (R. Tr. 144, 159, 349).

Raytheon had originally agreed to buy, it supplanted by what it felt were choicer items from the former B list (R. Tr. 159). Semiconductor protested by letter of January 10, 1962 (Def. Ex. I).[11] It pointed out that Raytheon had prepared the A List and said:

> "We have always proceeded on the assumption that your engineering department knew what it was doing when it compiled original Exhibit A and, since the substitution provisions of paragraph 2(b) were agreed to only for the purpose of allowing you to correct minor errors which you had made in compiling Exhibit A originally, we would assume that the greater bulk of the items on revised Exhibit A are the same items which were originally designated. Under those circumstances, the net changes should have been minimal * * *."

Raytheon replied on January 16th (Def. Ex. J)[12] admitting that it "is quite true that Raytheon initially prepared Exhibit A as it appears in the Agreement itself" but insisting:

> "The substitution provisions of paragraph 2(b) were not for the purpose of allowing us to correct minor errors but to permit us to change our mind as between Exhibit A and Exhibit B items. There was no understanding, express or implied, that this would be limited to minor exchanges. On the contrary (although I don't believe that this is the case) we had a perfect right to substitute for the entire list."

Since the contract had been drawn up by trained lawyers on each side, and nothing in its language limited the scope of substitution, whatever Semiconductor believed the purpose of the substitution clause to be, Semiconductor had no choice but to succumb to Raytheon's position. It accepted the revised A list on January 22nd (Def. Ex. K).[13]

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11. Introduced at R. Tr. 345.

12. Introduced at R. Tr. 347.

13. Introduced at R. Tr. 349. Raytheon never paid a cent more to Semiconductor as a result of the substitutions (R. Tr. 339).

The essence of the present suit and appeal is that with the shoe on the other foot Raytheon asks the Court to revise the option clause for its benefit to place limitations in it that are not expressed.

Throughout all November and December, 1961, and to the middle of January, 1962, Raytheon could have, at any time it wished, obtained title to any of the items on the B list by exercising its option. But it had not exercised that right (R. Tr. 165, 166), *because it did not wish to commit itself to anything whatever.*

At this juncture something occurred to recall the rumor of the previous October that Raytheon intended to "rook" Semiconductor. Raytheon privately had been calculating on picking up the B list assets, of a book value of close to $1,200,000 (See Def. Ex. 0),[14] for a paltry $280,000, or after applying the $250,000 rental, an added payment of only about $30,000 (R. Tr. 175). In the week ending January 10, 1962 (R. Tr. 149) Mr. Kather of Raytheon talked to Mr. Oesterle, one of Manufacturing's accounting employees, who had been lent to Semiconductor to coordinate record keeping at Mountain View in the transition to Raytheon operation (R. Tr. 462). Mr. Oesterle had no authority whatever to negotiate any sale of items on the B list (R. Tr. 422, 463, 527, 528). But Mr. Kather said to him that Raytheon might be willing to buy the whole B List[15] for $350,000 or possibly, if pushed, $385,000 (R. 150, 151, 177). **This was another shock,** for even the top figure constituted but 23% of cost and 30% of the book value as of June 30, 1961, which Semiconductor had rejected in the negotiations of the previous October. Mr. Kather, gathering the idea that Oesterle was receptive (R. Tr. 152), was so delighted that he at once "jubilantly" reported to Mr. Oldfield (R. Tr. 152), his superior (R. Tr. 156).

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14. Introduced at R. Tr. 454.

15. Not just the portion of the B List later involved in Manufacturing's offer but the whole list (R. Tr. 177).

The situation now confronting Semiconductor and Manufacturing was this. Raytheon appeared to be acting to the end of cannibalizing the B List and thereby impairing the value of the remaining assets (R. Tr. 220, 221, 223), as it was in a position to do. These fears were underscored by Kather's suggestion of the paltry $350,000 to $385,000. Moreover, with the substitution completed in January, the A and B lists had become final, and for the first time Semiconductor knew what was sold outright to Raytheon and what was leased; for "the first time * * * we could look at the picture realistically in terms of what was available" (R. Tr. 518, 519). Even so, it did not yet know what Raytheon might still elect to buy. Yet it had to know, in order to know what would be available for disposal elsewhere. As noted, there had been negotiations with the Japanese and consideration of uses in other foreign countries or in Manufacturing itself, and inquiries from Stanford Research Institute (See p. 8, supra, also R. Tr. 212-214, 217, 233, 234, 254, 490). But if Raytheon's option rights continued outstanding and unexercised, with Raytheon uncommitted, Semiconductor would be in the position of having to wait for the second shoe to drop, injuriously delayed until May 15th in knowing what equipment would be available for sale (R. Tr. 520, 521). The Japanese negotiations would continue to be frozen (R. Tr. 379, 508, 509). In order to be able to plan properly it was necessary to know what Raytheon was going to take in the teeth of its oft-repeated statements of disinterest (R. Tr. 221).

Manufacturing therefore decided to make an offer to Semiconductor for some of the B list. Mr. Mallatratt summed up one of the reasons motivating him in his testimony (R. Tr. 252, 253) that he had "in mind at the time that if Raytheon were to exercise an election to pick select items, it would then be in a position to buy the remainder at a depressed value" and thus "still be in the position to have the whole, but at a depressed price", and that "one of the purposes in Manufacturing making the offer was to

* * * prevent the consequences on value of cannibalization of the equipment". This has been described as a "stop loss approach" to the situation (R. Tr. 211).

6. THE STROUP-KATHER CONVERSATION OF JANUARY, 1962.

Manufacturing decided to make an offer to Semiconductor, but, before doing so, Mr. Stroup of Manufacturing telephoned Mr. Kather of Raytheon on January 12, 1962 (R. Tr. 523). Kather's version of this conversation (R. Tr. 154) differs from Stroup's (R. Tr. 523-525). Raytheon's brief gives this Court Kather's version (Br. 10, 11), but the trial court believed Stroup's, which must therefore be taken on this appeal as correct. Stroup informed Kather that Manufacturing was about to submit an offer to Semiconductor on some of the B list assets (R. Tr. 523, 524), as "of course", he said, "Rheem Manufacturing Company has the right, as we discussed in Massachusetts" (during the October negotiations, pp. 8, 9, supra), and Kather affirmed that that was so (R. Tr. 524, 525). The trial court found (Finding 22, R. 162):

> "22. On January 12, 1962, Rheem Manufacturing advised Raytheon that in accordance with its right to do so it intended to make an offer to Rheem Semiconductor for some of the leased assets and Raytheon acquiesced that Rheem Manufacturing had such a right."

Stroup went on to say to Kather in the conversation that Manufacturing would defer submitting an offer to Semiconductor to permit Raytheon to negotiate with Semiconductor for any of the equipment it wanted (R. Tr. 524).

Raytheon was thus given the opportunity to come in and finally commit itself to buy *what it wanted, if it wanted,* at fair market value. *It did not do so.* Some days later Kather telephoned to Stroup that Raytheon was *not* prepared to negotiate (R. Tr. 525).

Not until then did Manufacturing make its offer to Semiconductor (R. Tr. 525).

7. MANUFACTURING'S OFFER, BASED ON AN APPRAISAL OF FAIR MARKET VALUE AND FOUND BY THE DISTRICT COURT TO BE LEGITIMATE AND REACHED IN GOOD FAITH.

At the first hearing in the court below the District Judge initially was impressed by the appellation that Manufacturing's offer was a "rigged bid" (R. Tr. 649). But the facts quickly dispelled that description and, in the court's later words (R. Tr. 182), were an "enlargement of the perspectives". Had there been an intention of forcing Raytheon to buy at an unfairly high price or to buy all in order to buy any, Manufacturing would have made an offer on the whole B list at an inordinate price.

Instead, in order "to obtain a fair independent appraisal of a fair market value of the assets involved" (Mallatratt, R. Tr. 209), on January 12th (R. Tr. 295, 296), the day Stroup telephoned Kather, Manufacturing engaged the services of an expert in the machine-tool and equipment field, Mr. Ellison of the firm of Harron, Richards & McCone of Northern California (R. Tr. 269, 311-312) to appraise the "true fair market value" (R. Tr. 296, 495) of the items on the B list. Section 12 of the lease, which uses the words "fair market value", was read to Mr. Ellison (R. Tr. 373). Moreover, Mr. Ellison was asked by Manufacturing to be *conservative* in his appraisal, to be on the low and not the high side, because he might himself be asked to submit a bid for some or all of the items later (R. Tr. 298). In consequence the appraisal that Ellison eventually came up with "was substantially influenced on the downward side" by Manufacturing's caution (R. Tr. 304, 305). Mr. Ellison was called as a witness by Raytheon itself, and the District Court remarked that it was impressed with Mr. Ellison's integrity and the fact that he is "a very, very fine, well versed man in his field." (R. Tr. 628.)

Starting with a list (R. Tr. 271, 297) Mr. Ellison inspected the equipment at the Mountain View plant (R. Tr. 297). In consequence, he divided the List B assets into two groups. One group

comprised what appeared to be highly specialized, single purpose items related primarily to the Mountain View plant, not easily removed and resold to someone else, and which therefore would sell to others for a smaller fraction of acquisition cost. These Mr. Ellison placed in Group 2. The others, which he put in Group 1, were the items "which could be used in a more general way and on a broader base" (R. Tr. 286, 290; see also R. Tr. 491, 494, 503).[16]

Mr. Ellison stated three different values for the *whole* B List, depending on the standard applied, as follows:

1. $1,750,000:—"the value to Raytheon, in not having those assets taken away from the use to [in] which they had them and so that they wouldn't be required to go out and replace the equipment" (R. Tr. 306:6-11; R. Tr. 307:4).

2. $400,000 or $500,000:—Ripped out of the plant, with full lines of equipment broken up, knocked down, $400,000 if sold to a liquidator for resale, the liquidator expecting to resell for at least 20% profit, or $500,000 if a direct sale could be made to one who had use for 30% or 40% of the items and would then try to liquidate the remainder (R. Tr. 300). This figure of $400,000 or $500,000 was "*not* fair market value; it was liquid value, lump value, or lot sale value, for which Rheem could have, in my opinion, sold the entire group of assets to one person such as a speculator, or liquidator, or someone, for resale" (R. Tr. 272, 273, also 277). This is what he meant in his written report by the $400-500,000 figure (R. Tr. 273).

3. $638,960:—The "**fair market value**" (R. Tr. 285, 308). This sum was made up of $547,760 on Group 1 and $91,200 on Group 2. (R. Tr. 285.).

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16. Mr. Ellison called Group 1 "schedule A" and Group 2 "schedule B". The two together constitute List B (R. Tr. 285, 290, 291). To avoid confusion with List A and List B we substitute the terms Group 1 and Group 2.

These values Mr. Ellison reported by telephone to Stroup (R. Tr. 307), and Stroup reported them to Manufacturing's management (R. Tr. 511). In fact, Mr. Ellison reported to Mr. Stroup that the true fair value was "considerably more" than $638,960, but he reduced it to that amount on Manufacturing's concern, as noted above, that he give a "conservative market value" (R. Tr. 304, 305). His final written report to Manufacturing was mailed on January 16, 1962, giving his "final considered appraisal of fair market value", as $547,760 on Group 1 and $90,200 on Group 2 (R. Tr. 308).

After receipt of Ellison's written report Manufacturing waited until Kather telephoned Stroup that Raytheon was not interested in negotiating. Then, on January 17, 1962, Manufacturing made a written offer to Semiconductor for the Group 1 assets in exactly the amount of Ellison's appraisal of fair market value, viz., $547,-760.00, subject to Raytheon's right of first refusal, accompanied by a check for 10% as a deposit (Pl. Raytheon Grant Ex. 7). Semiconductor accepted the offer, and on January 18th notified Raytheon of the offer and acceptance subject to Raytheon's first refusal right (Ex. 3 to complaint, R. 97).

On receipt of this letter Raytheon did not react that Manufacturing had no right to make an offer or that an offer by it was not "bona fide". On the contrary, on January 22nd, its counsel, Mr. Resnick, who had been one of the negotiators for Raytheon and the person to whom it had entrusted the task of writing the contract and lease (R. Tr. 116), telephoned to Mr. Walter Lewis, Counsel of Manufacturing, and said that Raytheon "wished more time to consider it" and "decide what to do" as its time would expire on January 23rd. He did not say that the offer was not *bona fide* or that the parent corporation could not make an offer (R. Tr. 378). Mr. Lewis orally agreed that Raytheon could have until January 29th (R. Tr. 376) and confirmed

this extension by letter the next day (Def's Ex. L).[17] Then, *as an afterthought,* Raytheon, searching for some escape from the terms of the lease, conceived the idea that, since Manufacturing was the parent of Semiconductor, an offer by it was not "bona fide". On January 23rd, Raytheon wrote to Semiconductor (Ex. 4 to complaint, R. 104), acknowledging receipt of the notice of January 18th and saying:

> "*This is to advise that such notice is of no effect in that an offer by your parent corporation cannot be treated as a 'bona fide offer'* and secondly in that it fails to specify the individual prices offered for each item of equipment. We will regard any sale to Rheem Manufacturing Company made pursuant to paragraph 12 on the basis of such notice as made in breach of our agreement and will hold you accountable for all damages resulting directly or indirectly from such breach."

After finding, as quoted above (p. 14), that on January 12th Raytheon acknowledged that Manufacturing had the right to make an offer, the Trial Court further found (Finding 22, R. 162):

> "Later, upon receipt of notice from Rheem Semiconductor of the first offer, Raytheon on January 22, 1962 requested an extension of time in which to decide what to do, and not until afterwards did Raytheon advise Rheem Semiconductor that it contended that the offer of Rheem Manufacturing to Rheem Semiconductor was not bona fide."

Before receiving Raytheon's letter of January 23rd, Semiconductor discovered that Mr. Ellison had included in his figure of $547,760 some unavailable items of equipment. He had used a copy of the equipment list given to Raytheon in October. Raytheon had compiled from that list a List A of items to buy, a List B of items to lease, and a List C of items it rejected for all pur-

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17. Introduced in evidence at R. Tr. 377.

poses (R. Tr. 461). The List C consisted of sales office furniture, which was not even at Mountain View and was scattered throughout the United States (R. Tr. 430, 449).[18] Since Manufacturing's offer to Semiconductor called for delivery to it on the loading dock at Mountain View on June 1st (See P. Ex. 7), Semiconductor could not comply with the terms of the offer as respects the absent items (R. Tr. 449). When Mr. Grant, Semiconductor's vice-president (R. Tr. 403, 404) in charge of selling off its assets (R. Tr. 448; see Def. Ex. M, authority from the directors) discovered these facts (R. Tr. 425), he asked Manufacturing to change its offer to eliminate the non-deliverable items (R. Tr. 449), and Semiconductor and Manufacturing agreed to a rescission of the first offer and acceptance "in view of the unavailability of those items" (P. Raytheon Grant Ex. 8).[19]

Mr. Ellison was then asked for a reappraisal with the missing items omitted (R. Tr. 430). On the basis of his formula for reappraisal (R. Tr. 450), Manufacturing made a new offer in the reduced sum of $531,584 on January 26, 1962 (P. Raytheon Grant Ex. 9),[20] subject to Raytheon's right of first refusal. On accepting the second offer Semiconductor notified Raytheon by letter of January 26, 1962 (Ex. 5 to complaint, R. 106).

The original cost of these assets was $1,037,759 and the book value as of June 30, 1961 was $838,881 (D. Ex. O; R. Tr. 453). Manufacturing's offer was thus but 63% of book value.

At the close of the trial, with the evidence fresh in its mind, the Trial Court said (R. Tr. 628) that the offer by Manufacturing "was a legitimate bid predicated upon an appraiser's valuation which has not been disputed, and certainly not impugned"; the offer "was a fair bid under all the circumstances"; it was a bid made "in good faith". And in its Finding 15 it found (R. 160)

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18. List C's book value was about $25,000 (R. Tr. 430).

19. Introduced at R. Tr. 219.

20. Introduced at R. Tr. 225.

> "In fixing the prices specified in its two offers Rheem Manufacturing employed an independent appraiser, Mr. J. O. Ellison, to appraise the assets. He determined that the fair market value of the assets covered by the offer was $531,584, and Rheem Manufacturing's offer in that amount was based on that appraisal. Mr. Ellison is a man of integrity and well qualified to appraise the assets."

After its notice of January 26th to Raytheon, Semiconductor received Raytheon's letter of January 23rd. In its reply (Ex. 6 to complaint, R. 109) it referred to Raytheon's letter as denying validity of the notice of January 18th, assumed that Raytheon "will take the same position" with respect to the new offer, rejected that position, and, while regarding Raytheon's letter of the 23rd as a decision not to exercise its first refusal rights, recognized that Raytheon had through February 2nd to act, concluding:

> "If, however, you do not exercise your first refusal rights by the close of business on February 2, 1962, we shall consummate the purchase and sale arrangements with Rheem Manufacturing Company as scheduled in accordance with its offer of January 26, 1962."

8. RAYTHEON'S REPLY AND THE CONSUMMATION OF THE SALE TO MANUFACTURING.

On the last day, February 2, 1962, Raytheon wrote to Semiconductor (Ex. 7 to complaint, R. 112). It stated that it exercised its rights under Section 12 of the lease to purchase the items covered by Manufacturing's offer and that:

> "It is necessary that the price of the items hereby purchased be determined. As you know, it is our position that no bona fide offer has been received by you for any of the items listed and that the price will be determined pursuant to other provisions of the agreement."

On February 6, 1962, Semiconductor wrote to Raytheon that, since it had failed to exercise its right of first refusal within the allotted time, the sale to Manufacturing was complete (Ex. 8 to complaint, R. 115). Semiconductor wrote Manufacturing to the same effect (Pl. Ex. 14, R. 436) and asked for payment of the $476,808 balance of the purchase price. Manufacturing paid the balance in full on February 13th (Def. Ex. N, also R. 450-452).

Six days later Raytheon filed this suit.

9. THE DISPOSITION OF THE LIST B ASSETS NOT INCLUDED IN MANUFACTURING'S OFFER TO SEMICONDUCTOR.

Finding 23 (R. 162) shows what happened to the remainder of the leased assets, i.e., those not covered by Manufacturing's offer:

> "23. On February 2, 1962, Raytheon notified Rheem Semiconductor of its election under paragraph 12 of the lease to buy certain of the leased assets not covered in Rheem Manufacturing's offer. On April 10, 1962, Raytheon notified Rheem Semiconductor of its election under paragraph 12 of the lease to buy still more of the leased assets not covered in Rheem Manufacturing's offer."

These elections were effected by Def. Ex. D (R. Tr. 166)[21] and Def. Ex. E (R. Tr. 167). These two letters plus Manufacturing's offer covered most but not all of the leased assets (R. Tr. 169).

B. These Proceedings.

1. THE CONTROVERSIES ASSERTED IN THE COMPLAINT.

The complaint alleged and the answer admitted the basic contract, lease, and many of the letters referred to above. The com-

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21. Raytheon wrote two letters on February 2d, Ex. 7 to complaint concerning the items covered by Manufacturing's offer, and Def. Ex. D. We note this to avoid confusion.

plaint then asserted the existence of *two* controversies on which it sought declaratory relief. Defendants' answer admitted the existence of the two controversies and more explicitly stated them thus (R. 124):

(a) Was Manufacturing's offer to Semiconductor a valid offer? Raytheon claims it was not; defendants claim it was. If it was not, Raytheon became entitled to purchase the assets in question without regard to the amount specified in said offer. If it was, Raytheon was not entitled to purchase those assets except at the price specified in Manufacturing's offer and then only by exercising the right of first refusal by February 2, 1962.

(b) If Manufacturing's offer was valid, did Raytheon exercise its right of first refusal to purchase the assets at the price specified in that offer? Raytheon asserts that it did. Defendants assert that it did not and therefore had no right to purchase the assets at any price.

2. THE APPLICATION FOR INJUNCTIVE RELIEF AND THE ALLEGATIONS OF THE COMPLAINT THEREON.

In view of Raytheon's belittling of its need of the List B assets at the time it entered into the contract, of its effort in January to obtain them for less than 30% of book value, of Mr. Kather's statement to Mr. Stroup in January of no interest in negotiating for them, and of its refusal to meet Manufacturing's offer of $531,584, further allegations of the complaint are highly revealing. The complaint alleged, in summary (R. 6):

> That several hundred items on List B were processing machinery and equipment *essential* in fabricating semiconductors, and several hundred other items were electronic testing equipment *essential* to test semiconductors, that Raytheon was employing these items to fill contracts with the Department of Defense and industrial concerns, that it was not only *essential* to Raytheon that these products be delivered as scheduled but that the maintenance of steady pro-

> duction was of great importance to the general public interest, that should it be required to replace the items serious disruption of its production lines would ensue with incalculable damage to it.

Raytheon therefore sought an injunction against the defendants' removing the property. The complaint alleged Raytheon's readiness to pay for the property on whatever basis the court decided, $531,584 if the court found Manufacturing's offer valid, and it offered to, and did (R. 120), post a bond in that amount.

Defendants' answer *admitted* these allegations (R. 124, 125). *Thus it is an admitted fact that Raytheon needed the equipment, that it is of great value to Raytheon, and fully worth the $531,584.*[22]

Later the court found (Finding No. 8, R. 159):

> "8. Many of the leased items are installed in the Raytheon plant and were so as acquired from Rheem Semiconductor and are essential to the plant's operation."

On filing the complaint, Raytheon had obtained, *ex parte,* a temporary restraining order against the defendants' selling any of the assets or interfering with Raytheon's possession (R. 119-121). At the hearing on the application for injunction defendants pointed out that Raytheon's possession of the property under lease could not be disturbed until June 1st, and defendants asked for an immediate trial (R. Tr. 644-646, 656). The case was set down for trial in May 1962, and no interlocutory injunction ever issued.

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22. Indeed, Oldfield testified that the whole B list was being used in the plant (R. Tr. 67). So also this colloquy (R. Tr. 662):

> "THE COURT: Well, it is quite obvious, Mr. Wheat, that these assets are not distressed value assets; they are assets that have a real potential so far as you are concerned, aren't they?
>
> "MR. WHEAT: They are essential as far as we are concerned in more ways than just dollars."

3. THE FURTHER CONTROVERSY RAISED BY DEFENDANTS' COUNTERCLAIM.

As a counterclaim defendants alleged (R. 125, 126) that Raytheon's purpose was to acquire the leased assets at distress values, and that there was a third controversy requiring resolution by the court, viz: Raytheon not only contended that it was entitled to buy the assets at value to be appraised by American Appraisal Company but also contended

> "that the fair market value to be appraised is the value of the assets as removed from the premises and sold at distress or forced sale",

whereas Semiconductor contended

> "that if plaintiff is entitled to buy said assets at the fair market value as appraised by * * * American Appraisal Company, the fair market value to be appraised is the value of the assets in their present location and as part of plaintiff's operations * * *."

By its reply to the counterclaim (R. 136, 137) Raytheon admitted that a controversy existed as to the interpretation of the term "fair market value". The real nature of Raytheon's contention is shown by its brief in this Court. It asserts (Br. 46):

> "The value to Raytheon of the 'B' list items is a false criterion",

in other words, no element at all in determining value, because "Semiconductor could not offer for sale upon the market anything more than the equipment dismounted and on the loading dock" (Br. 45).

4. THE ISSUES, THE TRIAL, DECISION, FINDINGS AND CONCLUSIONS.

At the close of the trial in which 10 witnesses were heard and 25 exhibits received the court announced its decision on two of the three issues by an oral opinion (R. Tr. 626-629). The remaining issue it decided in a later written memorandum and order

and called on Raytheon to prepare findings and conclusions (R. 139, 140). Raytheon submitted its suggested findings and conclusions (R. 141-148), defendants submitted objections and proposed amendments to Raytheon's draft (R. 149-154), Raytheon filed objections to the proposed amendments (R. 155), and on June 4, 1962, the court made and entered its Findings of Fact and Conclusions of Law (R. 157-164).

(a) **First Issue:** When Section 12 of the lease provided that, if Semiconductor should receive a bona fide offer for any items of the leased property, it might sell to the offeror unless Raytheon should exercise a right of first refusal, did this preclude the offer by Manufacturing?

In its oral opinion the court decided this issue against Raytheon. It said that the contract and lease had been prepared by competent lawyers on both sides, and the court would not rewrite them (R. Tr. 626); the facts did not call for disregard of corporate entity; there was no fraud, no misrepresentation, no mistake and no situation of any need to disregard corporate entity in order to protect an innocent third party (R. Tr. 627). Manufacturing's offer "was a legitimate bid predicated upon an appraiser's valuation that has not been disputed, and certainly not impugned"; the offer "was a fair bid under all the circumstances", a bid made "in good faith" (R. Tr. 628).

The court's later Finding 17 found (R. 161):

> "Rheem Manufacturing's offer to Rheem Semiconductor of January 26, 1962, as well as its prior but rescinded offer of January 17, 1962, was a bona fide offer."

And Conclusion of Law No. 1 reads:

> "The offer from Rheem Manufacturing to Rheem Semiconductor was a bona fide offer and as such required Raytheon either to exercise its right of first refusal with respect to the items covered by the offer, or forego its option to purchase said items" (R. 163).

(b) **Second Issue:** Manufacturing's offer being valid, had Raytheon exercised its right of first refusal? This was the issue the court reserved, later deciding it for Raytheon. It is the subject of defendants' cross-appeal (See pp. 70-78 infra).

(c) **Third Issue:** What was the meaning of "fair market value" as used in the lease? In determining "fair market value", was the appraiser totally to disregard any element of value the equipment had to Raytheon by virtue of its location in the plant and by virtue of its existence as part of a complete operation, and was he simply to consider the value of the equipment as if it were broken up, dismounted, disassembled, knocked down and thrown onto the used equipment market? As correctly stated by Raytheon's counsel in the closing argument (R. Tr. 573), this issue of "the standard of appraisal" had to be determined regardless of the decision of the first two issues, because of Raytheon's election to buy most of the Group 2 assets, i.e., those not covered by Manufacturing's offer.

This issue the court also decided against Raytheon. It said (R. Tr. 628) that

> "fair market value certainly contemplates * * * that recognition be given to the use to which the article is placed, and I can't conceive that these assets, valuable as they are or invaluable, should be regarded as something to be dumped on the loading dock and therein appraised when we find that Raytheon has a valid and substantial use thereof."

The Court later formally found (Finding 25, R. 163):

> "25. Raytheon has a valuable and substantial use for all of said leased assets."

The subject is covered by Conclusion of Law No. 3, which provides that as to leased items not included in Manufacturing's offer to Semiconductor which Raytheon elected to purchase (Group 2), should the parties not agree on a price, the price should be determined by appraisal of American Appraisal Company, and:

"In making such appraisal the value to be appraised is the fair market value of the assets to Raytheon in their present location as part of Raytheon's operations." (R. 163)

C. The Judgment, Raytheon's Appeal, the Issues involved in That Appeal, the False Issues Discussed in Raytheon's Brief, and Summary of the Argument.

Judgment was entered on June 11, 1962 (R. 165-168) as follows:

1. **Paragraph 1** adjudged that Manufacturing's offer to Semiconductor was a bona fide offer and, as such, required Raytheon either to exercise its first refusal or to forego entirely its option to purchase the items involved (R. 165-166). From this adjudication Raytheon appeals (R. 169).

2. **Paragraph 2** adjudged that Raytheon's notice of February 2, 1962 (R. 112) exercised its right of first refusal, resulting in a binding contract between Raytheon and Semiconductor whereby title to the Group 1 assets of List B vested in Raytheon on February 2, 1962, and Raytheon became bound to pay $531,584 to Semiconductor by February 17, 1962 (R. 166). Raytheon does not appeal this, but defendants do by their cross-appeal which we discuss at pp. 70-78, infra. However, Raytheon purports to appeal from a portion of paragraph 2 with respect to a false and non-existent issue, as we show at p. 68, infra.

3. **Paragraph 3** adjudges that by Raytheon's letters of February 2, 1962 (Def. Ex. D) and April 10, 1962 (Def. Ex. E) Raytheon elected to buy the Group 2 assets of List B, the price to be determined by appraisal of American Appraisal Company if the parties could not agree on a price. All parties accept this part of the judgment, but Raytheon appeals (R. 170) from the remainder of paragraph 3, which provides (R. 167):

"In making such appraisal the value to be appraised is the fair market value of the assets to plaintiff Raytheon Company in the present location of said assets at the Moun-

tain View plant of plaintiff Raytheon Company as part of the operations of Raytheon Company."

4. **Paragraph** 4 reserved jurisdiction to resolve any further controversies that might arise in the application of the judgment, Raytheon appeals from this paragraph (R. 170), raising a false and moot issue (See p. 69, infra).

5. **Paragraph** 5 awarded costs to Manufacturing and Semiconductor (R. 167) pursuant to Conclusion of Law No. 5 (R. 164), which stated

> "Since defendants have prevailed on the issues requiring the taking of evidence, defendants are entitled to recover their costs."

Although in its "Objections to Proposed Findings and Conclusions of Law Submitted by Rheem" (R. 155-156), no objection was made to this, Raytheon appeals from this award of costs (R. 170). Since R.C.P. Rule 54(d) vests discretion in the trial court with respect to costs (and see 6 Moore's Federal Practice, 2d ed., Sec. 54.70[3] and [4]), we shall not discuss this issue further.

The captions in the argument below have been so worded that, read consecutively in the Subject Index, they constitute a summary of our argument.

Argument of Manufacturing and Semiconductor as Appellees on Appeal of Raytheon

I.

UNDER SECTION 12 OF THE LEASE, AN OFFER BY RHEEM MANUFACTURING COMPANY WAS A VALID OFFER REQUIRING RAYTHEON TO ELECT WHETHER TO EXERCISE ITS RIGHT OF FIRST REFUSAL.

A. The Nature of the Issue and of Raytheon's Contentions.

1. THE QUESTION IS ONE OF INTERPRETATION OF A CONTRACT, AND AN OPTION CONTRACT MUST BE STRICTLY CONSTRUED AGAINST THE OPTIONEE, HERE RAYTHEON.

Nothing in the laws of nature gave Raytheon a right to buy any of Semiconductor's assets or to buy them at one price instead of another. Any rights Raytheon has must be found in the contract, a contract carefully worked out and supervised by Raytheon's own capable counsel (see pp. 18, 25, supra). The question is purely one of interpretation of the contract and in the context of its negotiation.

Moreover, it is an elementary principle, as stated in 4 Williston on Contracts (3rd ed. 1961) p. 753, Section 620 (citing many cases), that:

> "Where contracts are optional in respect to one party, they are strictly interpreted in favor of the party bound and against the party that is not bound * * *"

Or as said in *McArthur v. Rosenbaum Co. of Pittsburgh,* 180 F.2d 617 (3 Cir. 1950), after quoting Williston, supra:

> "In an option the optionor is not bound beyond the point where the words of the option clearly and definitely bind him. Where, as in the present case, the words of the option are ambiguous, the optionor is not bound at all because the court cannot say to what obligation he is bound." (p. 620).

This is the law of California, *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp.,* 117 C.A. 2d 221, 255 P.2d 473 (1953):

> "Since the optionor is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option." (p. 229).

To the same effect are *Phillips Petroleum Co. v. Curtis,* 182 F.2d 122, 125 (10 Cir. 1950) and the cases cited on pp. 74-76, infra.

2. THE RATIONALE OF RAYTHEON'S CONTENTION THAT MANUFACTURING'S OFFER SHOULD NOT BE RECOGNIZED HAS SHIFTED AND VARIED BUT COMES TO REST ON DISREGARD OF CORPORATE ENTITY.

When Raytheon first conceived and advanced its contention in its letter of January 23, 1962 to Semiconductor that the offer was not "bona fide", it rested it *solely* on the fact that Manufacturing was Semiconductor's parent, for it said in that letter:

> "This is to advise you that such notice is of no effect in that an offer by your parent corporation cannot be treated as a 'bona fide offer' * * *" (See p. 18, supra).

In the complaint commencing this suit Raytheon described its contention in the same terms:

> "Raytheon asserts that the threatened sale from Rheem-Sub [Semiconductor] to Rheem-Parent [Manufacturing] is not bona fide but, on the contrary, is completely illusory, in view of the relationship which exists between Rheem-Parent and Rheem-Sub, as hereinabove described". (R. 5)

This is simply an argument that Manufacturing and Semiconductor must be considered as one;—in short, it is an attempt to disregard Semiconductor's corporate entity.

But the adjective "bona fide" preceding the word "offer" in Section 12 of the lease is not a device by which to work a disregard of corporate entity. As we see at p. 44 infra, a "bona fide offer" means neither more nor less than that an offer was in truth

made, not as a pretense or without intent actually to buy, not as a fraudulent representation. Patently Manufacturing's offer was a real offer. The offeror paid the offered price (p. 21, supra), and the very fact that Raytheon sought to enjoin Manufacturing from removing the assets recognized that the offer was a real offer which the offeror proposed to consummate unless prevented by the court. At the trial of this case Raytheon's counsel conceded that "on this subject of good faith * * * we [Raytheon] make no contention that Manufacturing * * * wasn't willing to pay to Semiconductor the amount specified." (R. Tr. 26). Counsel conceded that "the transaction was actual * * * it happened * * * there was an offer * * * it was accepted * * * the money passed" (R. Tr. 609:21-25).

Consequently, Raytheon's trial counsel retreated to the contention that the words "bona fide" added nothing at all to the contract, and that the result would be the same if those words were not there. Said he: "I think that the offer from Rheem to Rheem which was made would have been declared a nullity even in the absence of the descriptive words 'bona fide' " (R. Tr. 562:7-9). This was a forthright reliance on disregard of corporate entity, stripped of the mask of the words "bona fide".

But reliance on doctrines of disregard of corporate entity is so untenable that Raytheon's present counsel shy away from it. They say that the case does not require disregard of corporate entity (Br. 22) and that (Br. 26), "All of this is not to say that, under appropriate circumstances a bona fide offer could not have come from Rheem [Manufacturing Co.]". Thus present counsel profess to stake their case on the words "bona fide". They purport to find lack of bona fides in a perverse and distorted version of facts and circumstances (Br. 22-36) of which Raytheon had no knowledge at the time it denounced Manufacturing's offer as not "bona fide" and when it brought this suit,—in short, on a *post litem* lawyer's concoction (see pp. 52-55, infra). And yet, *on*

analyzing their reasons for urging that the offer was not bona fide, *it will be seen that they do rest on the fact that Manufacturing was the parent* (see pp. 49, 50, infra).

We discuss (1) whether there is any basis for disregarding the separate corporate existence of the two corporations, and (2) what may be conjured up out of the words "bona fide".

B. This Is Not a Case for Disregard of Corporate Entity for a Variety of Reasons. The Question Is Whether, as a Matter of Interpretation, the Parties to the Contract Intended to Preclude an Offer by the Parent.

1. DOCTRINES OF DISREGARD OF CORPORATE ENTITY ARE INAPPLICABLE WHERE THE REAL QUESTION IS ONE OF INTERPRETATION OF A CONTRACT.

Latty, Subsidiaries and Affiliated Corporations, Section 15, pp. 65, 66, cogently remarks:

> "In many cases, as above suggested, especially where the dispute is over an attempt to evade an agreement or a statute, the problem is largely one of interpretation."

In *Pullman's Palace Car Company v. Missouri Pacific Railway Company*, 115 U.S. 587, on the basis of contentions concerning *purpose* and *motive*, just as here, the plaintiff sought to disregard a corporate entity (see p. 596). The case was disposed of on demurrer, the Supreme Court holding that as a matter of interpretation of the contract plaintiff's case was without merit.

2. THE EXTRINSIC EVIDENCE RELEVANT TO INTERPRETATION SUSTAINS THE DISTRICT COURT'S FINDINGS THAT THE PARTIES AGREED THAT MANUFACTURING WAS NOT PRECLUDED FOM MAKING AN OFFER.

At pages 10, 14, 19, supra we quoted findings 21 and 22 (R. 161, 162) wherein the trial court expressly found that during the negotiations of the contract and lease *Raytheon was informed by Manufacturing and Semiconductor that Manufacturing might make an offer to Semicondoctor during the term of the lease for some of the leased assets, that Raytheon did not intend by the sub-*

sequent insertion of the words "bona fide" or otherwise to preclude an offer by Manufacturing to Semiconductor, and Semiconductor did not by agreeing to include those words, or otherwise, intend to preclude itself from receiving or accepting an offer from Manufacturing, that on January 12, 1962, Manufacturing advised Raytheon that *in accordance with its right to do so* it intended to make an offer to Semiconductor for some of the leased assets *and Raytheon acquiesced that Manufacturing had such a right,* and that Raytheon's present contention was an afterthought.

These findings are fully supported by the explicit testimony of Mr. Stroup and Mr. Lewis, reviewed at pages 8, 9, 14, 18, supra.

If the parties had mutually intended to preclude an offer by Manufacturing, particularly in the teeth of these conversations, they would have expressly so provided. As the court below said to Raytheon's counsel during the closing argument (R. Tr. 611-612):

> "THE COURT: Counsel—counsel, in the light of the conversations which are in evidence and not denied immediately prior to the execution of the contract, would you not regard it a provident act on the part of a careful and meticulous lawyer to incorporate a negative provision in the contract under such circumstances?
>
> "MR. WHEAT: My answer is 'yes,' but I do not quite understand. I don't think adding the word 'bona fide' as an adjective modifying the word 'offer' is negative.
>
> "THE COURT: It would have been a simple matter at the time to negative the possibility of a bid by the parent company, would it not?
>
> "MR. WHEAT: Oh, but there is—no question about it, that that is the last thing that anybody was going to be thinking about under the terms of these negotiations.
>
> "THE COURT: Counsel—Counsel, this is not a matter that rests now in the realm of speculation, conjecture or inference. There were plain, manifest discussions which had not been denied in this record concerning the probability, if not the prospect, of the parent company entering a bid. There

were at the time references made to the possibility of a Japanese enterprise, joint venture, if you please. * * * in terms of interpretation it seems elementary to me and certainly Hornbook law that the discussions having taken place immediately prior to the execution of the contract would put these highly skilled lawyers upon notice, and it seems to me that a provision could be incorporated therein."

Another item of extrinsic evidence is the conduct of the parties under Article VII, Section 4 of the basic contract (R. 44) before any controversy arose.[23] The date of closing of the contract was November 30th (R. Tr. 114), and Art. VII, Section 4 provided that Raytheon would reimburse Semiconductor for the amount by which disbursements exceeded receipts in the operation of the Mountain View plant between the effective date of the contract, November 1st, and the date of closing, and that Semiconductor would turn over to Raytheon the amount by which receipts exceeded disbursements. For the month of November Semiconductor paid interest to Manufacturing on loans. In the account Semiconductor submitted to Raytheon under Article VII, Sec. 4, it asked Raytheon to reimburse it for this interest, *and Raytheon did reimburse it* (Oldfield, R. Tr. 114, 115). If the corporate separateness of Manufacturing and Semiconductor were to be disregarded, if the two were to be considered but two "pockets" of one entity as Raytheon now contends (Br. 34, 40), Raytheon would not have had to reimburse that entity for moneys transferred from one pocket to another.

3. RAYTHEON KNOWINGLY CONTRACTED WITH SEMICONDUCTOR AS A CORPORATION DISTINCT AND SEPARATE FROM MANUFACTURING.

It is elementary that a corporate entity will not be ignored at the behest of one who has contracted with it as an entity, fully

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23. It is elementary that the contemporaneous construction by conduct of parties before a controversy arises is controlling in the interpretation of the contract. *Universal Sales Corp. v. Cal. etc. Mfg. Co.,* 20 C. (2d) 751, 761, 128 P.2d 665.

knowing about its stockholders, nor will it be ignored for the benefit of one who deliberately framed his business with respect to and in the light of the corporate organization, *Lynch v. McDonald*, 155 Cal. 704, 102 Pac. 918, which is cited by this Court to that effect in *Re John Koke Co.*, 38 F.2d 232, 233 (9 Cir. 1930). So also *Rashap v. Brownell*, 229 F.2d 193 (2 Cir. 1956). In *California Linoleum and Shade Supplies, Inc. v. Schultz*, 105 Cal. App. 471, 287 Pac. 980 (1930), plaintiff bought the assets and good will of a corporation which agreed not to compete with him in Los Angeles County. The complaint alleged that the defendant Schultz and two others had formerly done business as a copartnership, that they had then formed the corporation to conduct the business, "and that while it was in form a corporation, yet in truth and in fact it was a copartnership" (p. 473). Plaintiff's theory was that the corporate entity should be disregarded and that defendant Schultz should be held to have contracted individually not to compete with plaintiff in Los Angeles County. Judgment for defendant on sustaining a demurrer without leave to amend was affirmed because (pp. 473, 474) "plaintiff dealt with it [the party with whom he contracted] as a corporation" and "as stated before, the contract was with the corporation only and purported to bind it alone."

The record here plainly shows that Raytheon not only knew full well that Manufacturing owned essentially all of Semiconductor's stock but knew of the state of the accounts between them (p. 3, supra). Nevertheless, Raytheon chose to contract with Semiconductor as a separate entity, without writing into the first refusal provision of the lease any provision that the parent could not make an offer. Thus Mr. Oldfield, Raytheon's vice-president and chief negotiator (R. Tr. 60, 61) testified (R. Tr. 84):

> "Q. So, you understood, at the time you signed that contract on behalf of Raytheon, that Rheem Manufacturing

Company owned essentially 100 percent of Rheem Semiconductor stock?

"A. Or had it committed.

"Q. Yes. And when you negotiated that contract and executed that contract for the acquisition of assets and the lease of assets, you knew that you were dealing with Rheem Semiconductor as a separate corporate entity, did you not?

"A. Yes, we knew that our contract was with Rheem Semiconductor."

Again he testified (R. Tr. 86):

"Q. You knew then that you were talking about assets of Rheem Semiconductor Corporation and not Rheem Manufacturing Company?

"A. Yes, I did."

The contract contains a representation and warranty by Semiconductor (Art. IV, Sec. 6; R. 32-33) that

"(i) Rheem [Semiconductor] is a corporation duly organized, validly existing and in good standing under the laws of the State of California, (ii) Rheem [Semiconductor] has corporate power and authority to execute and perform this Agreement and to consummate the transactions herein contemplated * * *"

The contract also provided (Art. V, Para. 2(f), R. 37) that Raytheon would not be bound to consummate the agreement unless at its option it received from Semiconductor's counsel an opinion on the closing date to the same effect and in the same words as this warranty. Mr. Resnick, Raytheon's counsel in the negotiations and the author of the written expression of the contract and lease (R. Tr. 350), testified that he insisted on this warranty by Semiconductor that it was a valid corporation (R. Tr. 351) and on the requirement for an opinion by counsel (R. Tr. 353), and that (R. Tr. 352) *"The contract is written with Rheem Semiconductor. Q. As a corporation? A. Yes."*

Before closing Mr. Resnick demanded and received from Semiconductor's counsel the required opinion (R. Tr. 353).

4. NOR ARE ANY OF THE OTHER ELEMENTS ESSENTIAL TO A DISREGARD OF CORPORATE ENTITY PRESENT, AND THE TRIAL COURT'S FINDINGS TO THAT EFFECT ARE CONCLUSIVE.

This Court in *Re John Koke*, 38 F.2d 232, 233 (9 Cir.) also stated:

> "The rule is quite elementary that a corporation is an entity separate and distinct from its stockholders, with separate and distinct rights and liabilities; and this is true even though a single individual may own all, or nearly all, of the capital stock. True, courts, in exceptional cases, will look behind the corporate form in order to redress fraud, protect the rights of third persons, or prevent a palpable injustice; but there is no reason for invoking any such exceptional rule here, because it is not claimed that there was fraud, concealment, or even ignorance of any material fact in the original transaction."

It is elementary California law that the fact that one owns all the capital stock of a corporation and controls, dominates and manages it is not enough to hold that the two entities are one and the same, *Norins Realty Co. v. Consolidated A. & T. G. Co.*, 80 C. A. 2d 879, 883, 182 P.2d 593 (1947); *Dos Pueblos Ranch & Improvement Co. v. Ellis*, 8 C.2d 617, 621, 67 P.2d 340 (1933). The latter case followed with approval *Erkenbrecher v. Grant*, 187 Cal. 7, 200 Pac. 641 where it was said (p. 11):

> "were it otherwise, few private corporations could preserve their distinct identity, which would mean the complete destruction of the primary object of their organization."

This passage notes a truth that Mr. Justice Holmes repeatedly emphasized, that the very object and purpose of the corporate form is to serve as an instrumentality or medium by which a business enterprise may contract as a party separate from its stock-

holders. In *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, he said (p. 273):

> "Philosophy may have gained by the attempts in recent years to look through the fiction to the fact and to generalize corporations, partnerships and other groups into a single conception. But to generalize is to omit, and in this instance to omit one characteristic of the complete corporation, as called into being under modern statutes, that is most important in business and law. A leading purpose of such statutes and of those who act under them is to interpose a non-conductor, through which in matters of contract it is impossible to see the men behind."[24]

See also *Gardner v. Rutherford*, 57 C.A.2d 874, 136 P.2d 48 (1943), particularly at 881.

Furthermore, disregard of corporate entity is a question of fact, and the findings of the trial court on that subject are not lightly to be ignored. *Associated Vendors, Inc. v. Oakland Meat Co.*, 210 A.C.A. 896 (Dec. 17, 1962). Among the findings of the District Court here are the following (R. 161):

> "18. There was no fraud or misrepresentation at any time on the part of Rheem Manufacturing or Rheem Semiconductor and no mistake on the part of anyone.
>
> "19. There is no room and no basis in the facts to disregard the corporate entity of Rheem Semiconductor or to treat it as an alter ego of Rheem Manufacturing. On and before the Basic Contract was entered into Raytheon was informed and knew that Rheem Manufacturing owned practically all of Rheem Semiconductor's stock but nevertheless contracted with Rheem Semiconductor as a distinct and separate corporate entity.

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24. He reasserted the same idea in the court's opinion in *Klein v. Board of Supervisors*, 282 U.S. 19 at p. 24, thus:

> "But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with the intent that it should be acted on as if true."

"20. Refusing to disregard the separate corporate entity of Rheem Semiconductor will not promote a fraud or work an injustice."

5. SIGNIFICANT EXPRESS PROVISIONS OF THE LEASE AND BASIC CONTRACT PRECLUDE RAYTHEON'S INTERPRETATION OF SECTION 12 AND SUSTAIN THE DISTRICT COURT.

(a) Section 9(a) of the lease (R. 55) specifies that if any of the leased property not theretofore purchased by the lessee should in certain cases be destroyed, damaged, stolen, missing or unaccounted for:

> "In such event the portion of any such payment to Lessor determined by multiplying such payment by a fraction, the numerator of which is $250,000 and the denominator of which is the depreciated book value of all property as of June 30, 1961 on Schedule 1 to this Lease as not theretofore purchased by Lessee or sold *or for which Lessor has not accepted an offer from third persons,* shall be treated as the payment of purchase price by Lessee under this Lease."

We emphasize the reference to "an offer from *third persons*". *The only parties to this lease were Raytheon and Semiconductor.* The face of the lease so shows, and it calls Semiconductor the Lessor and Raytheon the Lessee (R. 53). Manufacturing was *not* a party to the lease. The words "third person" in an instrument necessarily include *anyone whatsoever* who is not a party to the instrument itself,—here anyone who was neither Raytheon nor Semiconductor. Since Section 9 of the Lease recognizes the right of any "third person" to make an offer, it recognized the right of Manufacturing to do so.

(b) Section 12 prescribed several options. The first was the right of first refusal granted to Raytheon. This extended only until March 1st (R. 57). After March 1st and until May 15th Raytheon had an option to purchase any leased item "not previously sold or for which Lessor has not accepted a previous offer" (R. 57), and Semiconductor had the right to sell any of

the leased items (subject to the remaining term of the lease) "to *any* party or parties at any time or times and at such price or prices as it shall deem advisable." In other words, between March 1st and May 15th Raytheon could elect to buy any item of property on the B list if Semiconductor had not already sold it to, or accepted an offer for it, from "any party". Thus, if Manufacturing in that interval had made an offer on any item on the B list before exercise by Raytheon of the right to buy, patently Raytheon could not ask that Manufacturing's offer be ignored. Raytheon's trial counsel, referring to the provisions just discussed, admitted this.[25] It being conceded that the word "offer" in Section 12 relative to the *post*-March 1st option cannot be interpreted to preclude an offer by Manufacturing, it follows that the same word in the earlier portion of the same section relative to the *pre*-March 1st option cannot be given a more restrictive interpretation. In short, a prior offer by Manufacturing after March 1st *would wholly cut off any right of Raytheon* to buy, and a prior offer by it before March 1st *would require Raytheon to meet that offer* or be foreclosed.

(c) Article I, Sec. 2(b) of the basic contract (R. 12) is the substitution clause referred to at page 7, supra. It provides:

> "At any time prior to December 15, 1961 Raytheon may elect to * * * substitute [for any item on the A list] any item or group of items [on the B list] not previously sold by Rheem [Semiconductor] to, or for which it has not accepted an offer from, *any* party * * *."

The word "any" is all-inclusive. Under this clause if Semiconductor had sold an item to Manufacturing, or accepted an offer from

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25. He said (R. Tr. 266): "after the first of March, they were free to practically do anything they wanted with the goods", and, again (R. Tr. 562-3) "the contract says that 90 days after execution of the lease, which would bring us to March 1st, Rheem [Semiconductor] is free to sell these assets to *any* party at any price and at that time Raytheon's right of refusal would have been extinguished."

it, Raytheon could not thereafter have sought to acquire that item from Semiconductor by the substitution procedure, on the theory that the purchase or offer by Manufacturing was to be disregarded. A different interpretation of the lease that would exclude the parent from making an offer effective under the first refusal clause is inconceivable.

6. OTHER PROVISIONS OF THE CONTRACT AND LEASE SHOW THAT WHENEVER THE PARTIES INTENDED A CONSEQUENCE WITH RESPECT TO A PARENT OR SUBSIDIARY OTHER THAN WOULD FOLLOW FROM THE FACT OF SEPARATE CORPORATE ENTITY, THEY EXPRESSLY SO PROVIDED AND DID NOT LEAVE THE MATTER TO ARGUMENT.

Many express provisions of the basic contract and lease demonstrate that whenever the parties intended to make some provision concerning a parent or affiliate, or whenever it was desired that a provision should not operate relative to a parent or a subsidiary as it would to any other third party, the contract expressly and specifically said so. Consequently, when in defining Raytheon's right of first refusal the parties failed to specify that an offer from the parent was not to be considered, no such exclusionary provision may be inferred. For example:

(a) In Art. I, Sec. 4 (R. 13), Semiconductor agreed to license Raytheon to use certain know-how and Raytheon agreed that it would not "assign such license to, or license or sublicense, any person, firm or corporation (except a foreign or domestic subsidiary or affiliate of Raytheon) to the use of the know-how."

Mr. Oldfield, Raytheon's chief negotiator, admitted that he was "responsible for the inclusion of provisions to permit us to license any affiliate or subsidiaries" (R. Tr. 89, 90, 91, 92) "because we wished to have the capability of licensing or sub-licensing our foreign or domestic subsidiaries" (R. Tr. 92). He requested Raytheon's lawyer to make sure that the contract contained language that *insured* this right, and his counsel drafted the particular language (R. Tr. 92, 93). Thus Raytheon did not suppose that the corporate separateness of parent and subsidiary was to

be disregarded and therefore was careful to obtain an express provision. In the same way, if Manufacturing were to be precluded from making an offer under Section 12 of the lease, it would have been expressly stated.

(b) Section 8 of the lease (R. 55) provides that the lease shall not be assigned by the lessee (Raytheon) without the written consent of the lessor, but that

> "Nothing herein shall prevent the assignment of Lessee's interest hereunder to a wholly owned subsidiary of Lessee * * *"

This, too, is plain evidence that where the corporate distinctiveness of parent and wholly owned subsidiary was to be disregarded for some specific purpose, express provision was made.

(c) In Art. I, Sec. 4(e) of the basic contract (R. 17) Raytheon covenanted that during a certain period of time it would not in any manner "adversely discriminate in its accounting practices either against its semiconductor operations and in favor of any other operation carried on by *it* or *its subsidiaries and affiliates* * * *."

(d) In Section 4(f) (R. 17, 18) it was provided that if Raytheon should transfer or assign all or a substantial part of the assets used by it in its semiconductor division "to *any* other * * * corporation whether through sale, merger, consolidation or otherwise, such transfer, sale or assignment shall be on the condition that the purchaser or successor shall assume Raytheon's obligations * * *." No reference to consolidation or merger would have been necessary if affiliates were bound without saying so.

(e) Article IV, Sec. 4 (R. 30, 31) provided that, if facts existed at the time of closing which established any material falsity, inaccuracy or breach in or of any of the representations, warranties or covenants of Semiconductor, Raytheon should be limited to the right to (1) waive the defect and require consummation, or (2) abandon the agreement without liability of any party. Subdivision (b) (R. 31) then stated that since the purpose

of the provision was to avoid penalizing the defaulting party, it would not apply if the defaulting party had actual knowledge of the falsity or inaccuracy. If the provision had ended there, knowledge of Dr. Baldwin of Semiconductor, who was going over to Raytheon, of any falsity would have charged Semiconductor. But the contract then provided (R. 31):

> "As used hereinabove, 'actual knowledge' shall mean as to Rheem [Semiconductor] only matters actually known to officers and employees of Rheem Manufacturing Company."

Without this express provision, Manufacturing's lack of knowledge of a falsity would have furnished no protection, for it was a third party, unless corporate entity was to be ignored. Since it was not to be ignored, an express provision was necessary. Thus again, when the parties intended to refer to the parent company and to make provision about it, they said so explicitly.

(f) Subjoined to the basic contract between Semiconductor and Raytheon is a statement signed by Manufacturing specifically denominated "Rheem Manufacturing Company" (R. 45) whereby it "hereby approves" the foregoing agreement. This approval was given because California Corporations Code Sec. 3901 requires the consent of a corporation's stockholders to any transaction whereby all or substantially all of a corporation's assets are being sold. If the parties intended corporate entity to be disregarded, the approval would have been unnecessary, for Semiconductor's contract would have been Manufacturing's without more.[26]

C. Manufacturing's Offer Cannot Be Ignored by Recourse to the Words "Bona Fide".

Raytheon's brief seeks (1) to read into the words "bona fide" a prescription about motive and then (2) to discredit Manufacturing's motive. Both branches of this effort are unmeritorious.

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26. Still other provisions of the basic contract recognized the separateness of Manufacturing and Semiconductor, e.g., Art. I, Sec. 4(d) (R. 16, 17), Art. III (R. 28), Art. IV, Sec. 5 (R. 32).

1. THE WORDS "BONA FIDE" BY THEMSELVES DO NOT WORK ANY LIMITATION ON THE POWER TO EXERCISE A RIGHT BY REFERENCE TO THE MOTIVE INDUCING THE EXERCISE BUT, APPLIED TO AN OFFER, SIGNIFY ONLY ACTUALITY OF THE OFFER.

"The words 'bona fide' mean 'in good faith' ", *Silver v. Bank of America,* 4 C.A. 2d 639, 644, 118 P.2d 891 (1941). " 'Bona fides' is defined as 'in or with good faith; without fraud or deceit; genuine' ", *Covert v. State Board of Equalization,* 29 C.2d 125, 134, 173 P.2d 545 (1946). The basic meaning of "good faith" is "really, actually, without pretense", *Baumgartner v. Orton,* 63 C.A. 2d Supp. 841, 844 and cases cited.

"Bona fide" is an adjective. Raytheon's brief clips phrases from cases about "motive" in connection with that adjective or its English equivalent, "good faith". But the cases involved statutes specifying a certain motive or purpose as a necessary condition to the valid exercise of a power and stating that the motive or purpose assigned must be "bona fide" or in good faith. The impact of a word or phrase used as an adjective or adverb in a given context depends on the noun or verb to which it relates. If it relates to "purpose" or "motive", the assigned purpose or motive must not be a sham; it must be the true one or, interpreting the statute in the light of the purposes of the statute, it must be the dominant one and not subordinate to another purpose which the statute denounces. Here, where the words relate to "offer", they signify only that the offer be a real offer, not a sham.

The phrase "bona fide" may not be used as a device to siphon into the contract limitations, restrictions, conditions or qualifications which a party *ex post facto* wishes that he had put into the contract when it was made. They are not a vehicle by which to rewrite a contract to accord with someone's notions of a more equitable deal. They mean "actual" or "real", and Manufacturing's offer was real (p. 31, supra). Nothing more can be read into these words than their plain meaning of actuality. In the case of *In Re Herman,* 183 Cal. 153, 191 P.2d 934, a proceeding under the California Political Code to ascertain and establish the stand-

ing of a newspaper as one of general circulation, a governing element was the Code requirement that the newspaper must have a bona fide subscription list. The court held (p. 164) that the term "bona fide" merely meant "a real, actual, genuine subscription list" of those actually paying for their subscriptions, and that it did not require that the subscription list be of any particular size or large enough to constitute the paper an adequate medium for public advertising. As it said (p. 164):

> "the legislature has not specified the number of subscribers required, and we must assume that it meant that the words *'bona fide'* were to be taken 'according to their common acceptation.' "

In *Covert v. State Board of Equalization,* 29 C.2d 125, 173 P.2d 545 (1946) the State Board of Equalization had revoked an on-sale liquor license on the ground that a restaurant could not be deemed "bona fide" because the income from the sale of liquor exceeded that from the sale of food. The court rejected the contention, pointing out that the Constitution provided no such quantitative test but rather

> "it simply requires that there be a bona fide eating place. 'Bona fide' is defined as 'in or with good faith; without fraud or deceit; genuine.' " (p. 134)

In *Silverman v. Rada Realty,* 45 So. 2d 758 (Fla. 1950), Unique Hotel Corporation leased its sole asset to Silverman with "an option of renewal for a stated term, the option, however, to be of no avail 'in case of a bona fide sale of the premises by the Lessor * * *' ". The stockholders of the lessor corporation then sold all their stock to other persons, who then exchanged it for a deed to the leased property, then organized Rada Realty Company, and conveyed to it the property in return for stock in the new corporation. Thus the lessor's new stockholders in effect transferred the property to themselves by having it transferred from one corporation they owned to another they owned. The

question was whether this was a bona fide sale of the premises so as to defeat the option of renewal. The court held that it was.

One of Raytheon's citations illustrates what should have been done if the parties had intended to limit an offer by Manufacturing by its purposes. In *Muzzy and Wells v. Allen*, 25 N.J. Law 471 (1856) a lease provided that on a sale by the lessor "for building lots" the lease should terminate. The "right to sell and thus put an end to Allen's lease" was by express words thus limited to sale for no "other purpose than for building lots" (p. 474). The parties did not use and did not look to the words "bona fide" or "good faith" to qualify a right by purpose. They expressly specified purpose.[27]

Raytheon's citations.

The bulk of Raytheon's citations[28] involve a construction of the legislative intention of federal rent control acts which forbade a landlord from suing to oust a rent paying tenant from housing on which a rent ceiling had been placed "unless * * * the landlord seeks in good faith to recover possession of such housing accommodations for his immediate and personal use and occupancy as housing accommodations." Since the statutory test of

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27. In *Ogle v. Hubbell,* 1 Cal. App. 357, 82 Pac. 217, also cited by Raytheon, the term "bona fide" also did not appear in the document. There a lease provided that on sale by the lessor the lease should terminate, conditioned by a right of preference to the lessee to purchase. The lessor purported to sell the property to her own son and another, but the finder of fact found that there was not *in truth* any sale at all, that it was wholly "fictitious" or "pretended" (p. 365). In that case as well as the *Muzzy* case the question was whether what was done was *truly* what it purported to be.

28. *Janise v. Bryan,* 89 C.A. 2d Supp. 933, 201 P.2d 466 (Appellate Dept. Los Angeles Superior Court), *Staves v. Johnson,* 44 Atl. 2d 870, 871 (D.C. Municipal Appeals); *Dargel v. Barr,* 204 F.2d 697, 699 (Em. App.); *McSweeney v. Wilson,* 48 Atl. 2d 469, 471 (D.C. Municipal Appeals); *Snyder v. Reshenk,* 131 Conn. 252, 38 Atl. 2d 803; *Gibson v. Corbett,* 87 C.A. 2d Supp. 926, 200 P.2d 216 (Appellate Dept. San Francisco Superior Court).

right to oust the tenant was the landlord's purpose, it was necessary to ascertain whether the owner's dominant and controlling purpose was to obtain possession for himself or really to eject the tenant.

Two of Raytheon's citations involve the legislative meaning of the provision of the National Labor Relations Act that it is an unfair labor practice to refuse to engage in collective bargaining in good faith.[29] Since the essence of the meaning of the term "good faith" is that whatever is referred to must be *truly* what it purports to be, and since by "bargaining" the statute means bargaining with the purpose of arriving at an agreement, to bargain in good faith means to bargain with an unpretending, sincere intention and effort to arrive at an agreement. The correlative is that a "bona fide" *offer* is one made with true intent to consummate the offer, no more.[30]

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29. *National Labor Relations Board v. James Thompson & Co.,* 208 F.2d 743 (2 Cir. 1953) and *National Labor Relations Board v. Stanislaus Imp. & H. Co.,* 226 F.2d 377 (9 Cir. 1955).

30. Others of Raytheon's citations involve the interpretation of the words "bona fide" or "good faith" in statutes or contract so remote from the present situation that we treat them in this footnote.

Kam Koon Wan v. E. E. Black, Ltd. 75 F. Supp. 553, 561, (D. Haw. 1948) involved the right to back wages under federal statutes which provided that it should be a defense that the employer acted "in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval or interpretation of any agency of the United States." The wages had not been paid because of actual reliance on a wage freeze imposed by the military government of Hawaii during World War II.

In re Vater, 14 F. Supp. 631 (E.D. Ky. 1946), involved a provision of the bankruptcy law that a petition for composition and extension could be amended to one for bankruptcy if there had been a proposal in good faith to the creditors for composition and extension. A proposal, as the court described it, "to pay the indebtedness if and when they [the debtors] are financially able" (p. 633) was a "preposterous" proposition that no creditor could be expected to give any serious consideration to and therefore was not really a proposal at all (p. 633).

McDonald v. Thompson, 305 U.S. 263, was a suit by a trucker to enjoin the State of Texas from preventing him from using the highways on the ground of conflict with the Federal Motor Carrier Act of 1935. Since the trucker had no certificate from the Interstate Commerce Commission, no conflict existed unless he had been in "bona fide operation as a

2. MANUFACTURING'S PURPOSE AND MOTIVE, IF RELEVANT, WERE LEGITIMATE.

(a) Raytheon's argument is based on an assumption as to interpretation of the contract and the purpose of the contract which is foreclosed by the findings.

But even if some notion of "legitimacy" of purpose were here to be read into the words "bona fide", Raytheon's argument would fail. "Legitimacy" is to be tested by some standard, and *the only standard here is the intent of the contract,* for Raytheon has no rights save those that the contract gave it.

The case thus comes back to interpretation of the contract. Just as the meaning of "good faith" in a statute is a matter of interpretation of the statute, the meaning of "good faith" in a contract is a matter of interpretation of that contract. *And on the basis of all the evidence the District Court held that the parties did not intend to preclude an offer by Manufacturing.*

From first to last Raytheon never wished to commit itself to anything while endeavoring to commit Semiconductor (see pp. 5-8, 11, supra). In defense of its passion for non-commitment, it has said, in effect, "Such was our bargain". The question, then, is: What was the bargain?

The distillate of all Raytheon's argumentation is that Manufacturing had no right so to act as to require Raytheon to pay $531,584 for the assets, if it wanted them, when the contract gave it an option to buy for less. Indeed, Raytheon says so

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common carrier by motor vehicle on June 1, 1935." He had been in operation on that date only because he had obtained a temporary injunction against the Texas authorities, which was dissolved on appeal.

Woolley v. Standard Oil Co. of Texas, 230 F.2d 97 (5 Cir. 1957) involved an oil lease requiring rental installments to be paid to a specified depository for distribution to the usual multiplicity of lessors and assignees of lessor interests. To avoid the harsh rule of Texas law that a lease terminates on failure to pay rental promptly, the lease provided that it would not terminate if the lessee "shall, in good faith and with reasonable diligence attempt to pay any rental, but shall fail to pay or incorrectly pay some portion thereof" and remedied the error on notice. The lessee promptly paid the correct amount of an installment of $125.00 to the specified depository, but an allocation schedule was in error due to a bookkeeper's mistake resulting from assignments.

boldly, when it asserts (Br. 26, 27) that the "essence of the agreement was [after segregating List A] to give Raytheon the right to select any or all of the remainder and buy it at fair market value", and that the offer and acceptance "were a bald attempt to subvert that contract right"; and again (Br. 35), when it speaks of the "natural scheme provided for in the agreement", or refers (Br. 39) to the offer as "a device to take away Raytheon's agreed right of selection and force a higher price". This, of course, is a question-begging and circular argument, because it assumes that the contract gave Raytheon an unlimited right of selection and right to buy for less. Unless the contract is read as precluding Manufacturing from making an offer at all, this is a false assumption. As we saw at pp. 7, 8, supra, Semiconductor reserved the right to receive an offer from others than Raytheon *as a limitation on Raytheon's free option, a limitation on an otherwise wholly one-sided contract that would have left Semiconductor denuded to Raytheon's cannibalism.*

(b) Raytheon's argument comes back to an interpretation of the contract that would disregard the corporate entity, and this is foreclosed by the findings.

In the very breath of denial that its case rests on disregard of the corporate entity, Raytheon stultifies its denial by asserting that bona fides does not "hinge [ ] upon the readiness and ability of the offeror to complete the purchase when to do so would mean merely putting money from one pocket into another" (Br. 22), and this is embroidered with reiterated assertions that the amount Manufacturing paid Semiconductor would make no "economic difference" (Br. 32-35, 39, 40). *But unless corporate entity is disregarded, it is false to speak of putting money from one pocket into another.*

Raytheon states that it essentially predicates its claim that the offer was not bona fide on two supposed facts (Br. 23-26). It says, first, that Manufacturing did not want the equipment for itself. Even if true (the facts are stated at pp. 8, 9, 13, supra), this

would be irrelevant, because nothing in Section 12 of the lease specified that an offer had to be by one who wished to acquire the assets for his own use.[31] Plainly an offer by a third party—Company X—could not be held to be mala fide on such a ground. Without disregarding corporate entity, a different rule cannot be applied to the offer by Manufacturing. Realizing this, Raytheon adds, as a second ground, that Manufacturing's offered price was above the fair market value of the equipment to any third party purchaser to whom Manufacturing might resell it. Were this true, it would be irrelevant, unless, again, corporate entity were to be disregarded. Once it be granted that Manufacturing was free to make an offer at all, not a syllable can be found in the contract limiting its freedom as to the amount of its offer. The fallacy of Raytheon's argument is exposed by positing, again, that a complete stranger—Company X—had made an offer to Semiconductor. Raytheon could not object to the amount of the offer.

(c) Raytheon's various other attempts to belittle Manufacturing's "good faith" are precluded by the findings.

Even if one departs from the contract into a realm of visceral reactions to "good faith", Raytheon's arguments fail.

Its statements about the offer being above market value and allied matters (Br. 23, et seq.) are erroneous, in part an effort to draw inferences from the record contrary to those drawn by

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31. The District Court had a realistic understanding of the situation, as shown by the following colloquy (R. Tr. 205: 7-16):

> "MR. LASKY: They were going out of the business of manufacturing semiconductor devices and selling semiconductor devices without in any way [having] made up their minds they would be out of it permanently. Yes, that is the fact.
>
> "THE COURT: And that, of course, would not foreclose them from the acquisition of any and all items of the B contract or the B exhibit if at a later stage they saw fit either to resell the items or to use them themselves.
>
> "MR. WHEAT: I think Mr. Lasky's comments cover the point to my satisfaction, your Honor."

the trial court, and, in part, particularly as respects the Ellison appraisal, a plain distortion of the record.

The District Court found that the amount of the offer was based on the appraisal of fair market value by a thoroughly competent and qualified appraiser, and that the offer was "legitimate" and "fair" in all the circumstances (see pp. 16, 17, 25, supra). Raytheon summoned Mr. Ellison as its witness at the trial and justified doing so as follows (R. Tr. 276):

> "MR. WHEAT: On the other hand, I think that since their good faith is largely dependent upon their actions taken upon reliance upon Mr. Ellison's appraisal, it is only fair for us and the Court to know the underlying circumstances that motivated Mr. Ellison".

Raytheon thus took the position that if Mr. Ellison conscientiously tried to appraise the fair market value of the property and if Manufacturing conscientiously used his figure as its offering price, its offer was "bona fide". *The District Court then found these to be the facts.* Raytheon having tendered the issue of good faith or "bona fides" to the District Court as a question of fact and as "largely dependent" on the factual elements just mentioned, that court's findings are an end of the matter. As said in *Shumate v. Johnston Publishing Co.*, 139 C.A. 2d 121 at 130, 293 P.2d 531 (1956) "a party cannot request that an issue be submitted to a jury as a question of fact and on review escape the consequences." Good faith, when it is an issue, *is an ultimate fact* and a question for the determination of the trier of the facts; an appellate court will not weigh the evidence or substitute its inferences for those of the trier. *Fuller v. Berkeley School District*, 2 C.2d 152, 161, 40 P.2d 831. And see Raytheon's own citations, *Janise v. Bryan*, 89 C.A. 2d Supp. 933, 940, 201 P.2d 466, citing cases; *Staves v. Johnson*, 44 Atl. 2d 870, 871; *Dargel v. Barr*, 204 F.2d 697, 700; and *National Labor Relations Board v. James Thompson & Co.*, 208 F.2d 743 (2 Cir. 1953), where, on this

very ground, the court (Learned Hand, J.) refused to enforce a Labor Board order because the Board had ignored an examiner's finding that a refusal to bargain was in good faith.

Raytheon's brief (p. 31) sneers at Mr. Ellison as the "four hour appraiser" and belittles his appraisal as hurried. But it is a sufficient reply to quote the Trial Court (R. Tr. 628):

> "I find affirmatively that the bid entered by the parent corporation was a legitimate bid predicated upon an appraiser's valuation which has not been disputed, and certainly not impugned, nor does Mr. Ellison's integrity bear any marks of erosion. He was here for cross-examination. He impressed this Court as a very, very fine, well-versed man in his field, and I am satisfied from his testimony that the predicate for his findings, although they were very quickly made, would be fortified in the light of any contra experts that we might hear from. He did say that the bid of $539,000-odd of the Rheem bid was a fair bid under all the circumstances."

This is also a sufficient reply to the efforts to belittle the fact of reliance by Manufacturing and Semiconductor on the Ellison appraisal.

Raytheon asserts that no negotiations between Manufacturing and Semiconductor preceded the offer and acceptance, that Semiconductor held no directors' meetings to discuss the offer and made no effort to obtain a higher price, and that Manufacturing alerted Mr. Grant to sign the acceptance (Br. 28-30). The facts are these: Whether an offer should be made by Manufacturing to Semiconductor had been a matter of general discussions among the executives of the two companies (Mallatratt, R. Tr. 208). Mr. Grant was both a director (R. Tr. 443) and vice president of Semiconductor (R. Tr. 444). Its board had conferred authority on him with respect to the disposition of its assets (R. Tr. 448). He was told that Manufacturing intended to make an offer to Semiconductor (R. Tr. 448), knew what Mr. Ellison's appraisal of fair market value was (R. Tr. 448), and when

the offer was presented to him he compared it with Ellison's appraisal and had in mind that they were identical when he accepted the offer (R. Tr. 450). Not even good business judgment required that he then shop for a higher price. Much less can it be said that failure to do so showed bad faith.[32]

Similarly (Br. 30) Raytheon belittles the Japanese and other negotiations for disposition of the assets, but *credibility was for the Trial Court to decide.* Raytheon would discredit the evidence because the "outside 'negotiations' were not carried further" after Manufacturing's offer was accepted (Br. 30). But just 6 days after the sale to Manufacturing was consummated, this suit was brought, a restraining order obtained, and this suit was then pressed to an early trial. With litigation over its rights to the assets, Manufacturing was unable to carry on further negotiations to dispose of the assets.

As an allied argument (Br. 31, 32) Raytheon belittles the reality of the desire to protect the value of "full lines of equipment" by citing the testimony of its employee, Breene, that no full production line for producing any given model of semiconductor device could be built up from the B list. Breene disavowed testifying that no full line of equipment could be built up to manufacture any kind of electronic equipment (R. Tr. 320, 321). But, more important, the inquiry was one of Manufacturing's state of mind. Raytheon goes so far as to say (Br. 32) that "Defendant's counsel expressed no doubt that Mr. Breene was fully qualified as to whether a full line of equipment could be gotten out of

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32. Raytheon also would create some innuendo by the statement (Br. 28) that "Grant, like the other officers of Semiconductor, received his compensation from Rheem [Manufacturing Company]". Not only does the cited testimony relate to the date of testifying in May 1962, but it is pointless: Manufacturing had a legal staff, a controller's department, a tax department and other staffs, and as a method by which costs could be kept at a minimum the practice was followed of making the services of those specialized staffs available to the several subsidiaries in consideration of payment by each subsidiary of certain annual charges based on investment (R. Tr. 359-361). Grant was paid by Manufacturing as its assistant controller (R. Tr. 403, 404).

the deal or not." But Raytheon fails to note the context of that statement, which was this (R. Tr. 314, 315):

> "MR. LASKY. Just a moment. If the Court please, it looks to me as if this line of inquiry is irrelevant and I object on that ground. The issue to which I suppose everything is directed is one of Rheem Manufacturing's good faith, and belief of this gentleman, whom I have no doubt is wholly qualified as to whether you could get a full line of equipment out of the B list or not, would have no bearing upon the state of mind of Rheem Manufacturing Company, and Mr. Mallatratt, who was concerned with whether there was a full line of equipment there. If he thought there was and that it would be cannibalized, this gentleman's belief that there was not would not bear upon the good faith element."

On these very matters the Trial Court said at the close of the trial (R. Tr. 611, 612):

> "*There were plain, manifest discussions which had not been denied in this record concerning the probability, if not the prospect, of the parent company entering a bid. There were at the time references made to the possibility of a Japanese enterprise, joint venture, if you please. Whether or not the full line could complement one or the other is, of course, open to conjecture.* I am not sitting here as a scientist; I am sitting here as a Judge. The scientist said on the stand the other day that maybe the line couldn't be completed. Now, that may be true. I am not disagreeing with the scientist, * * * I am bound under my duty and my oath to interpret the contract, * * *"

Other arguments of Raytheon trifle. For example, it argues (Br. 29) that Manufacturing did not try to buy from Semiconductor at a lower price. Then, on the same page, it castigates Manufacturing and Semiconductor for rescinding the first offer so as to reduce the amount in the second offer. Thus Raytheon wants it both ways, that it was bad faith to reduce the offer and bad faith not to reduce it more! Since Manufacturing owns 99.9%

of Semiconductor's stock, it had a fiduciary relationship to Semiconductor not to offer too little or to hold it to a contract it could not perform because it inadvertently covered undeliverable items (See p. 19, supra). Adhering exactly to the impartial appraiser's valuation as first made and then revised on elimination of non-available items, and not trying either to push it up or chisel it down, shows good faith, not bad faith, if relevant to the issue at all.

Even more trifling is the argument (pp. 33, 34, 39, 40) that "Semiconductor gave its parent * * * a gratuitous indemnity against loss if it could be legally established that Raytheon had exercised its right to purchase", citing P. Ex. 14. This refers to the fact that in its request of Manufacturing for payment of the balance of the purchase price (P. Ex. 14), Semiconductor wrote:

> "In the event, however, it is established by Raytheon Company in any appropriate legal proceeding that it has effectively exercised its right to purchase such property, we will reimburse you for any loss you might sustain by reason thereof".

Raytheon's letter of January 23, 1962 (Ex. 4 to the complaint) had already ended with the threat of litigation in the event of any sale to Manufacturing. Should such litigation result in a judgment that Raytheon had effectively exercised its right to purchase the property, it would follow that Semiconductor had no property to deliver to Manufacturing on June 1st in return for the $531,584 it was receiving. There would be a failure of consideration, and Semiconductor would be legally obliged to return the purchase price. Under elementary law and the old ditty that

> "He who sells what isn't his'n
> Must pay the price or go to prison",

the passage in Semiconductor's letter stated no more than an elementary legal obligation.

(d) If there is bad faith in this case, it is Raytheon's.

If there is bad faith in this case, it is Raytheon's. Raytheon's complaint (R. 1) proclaimed that the equipment was worth to it every cent of the $531,584 (see pp. 22, 23, supra). Yet, as revealed in its discussion of the issue covered in Part II below, its purpose in seeking to have Manufacturing's offer declared null was to snap up the equipment at a junk price in the teeth of the rejection of that very offer the previous October.

The contract was a highly favorable one to Raytheon, particularly in view of the literal application of the substitution clause which the District Court quite naturally appraised as giving Raytheon a very one-sided advantage (see pp. 7, 8, supra). Had there been, in addition, a preclusion of Manufacturing from making an offer under Section 12 of the lease, the contract would have been inequitable and intolerable beyond belief.

Semiconductor would never have agreed to such a preclusion, no such preclusion was provided, and none can be supplied by interpretation, by doctrines of disregard of corporate entity, or by perversion of the words "bona fide".

II.

SINCE RAYTHEON WAS NOT ENTITLED TO HAVE THE ASSETS APPRAISED WITHOUT REGARD TO THEIR USE AND UTILITY IN RAYTHEON'S PLANT AND AS IF DISMEMBERED AND BROKEN UP, THE APPEAL FROM PARAGRAPH 3 OF THE JUDGMENT FAILS.

Paragraph 3 of the judgment relates to the determination of the purchase price of such of the List B items as were not involved in Manufacturing's offer and for which Raytheon must pay a price as appraised by American Appraisal Co.

A. The Question.

While Raytheon formally appeals from the following provision of paragraph 3 of the Judgment (R. 167):

> "In making such appraisal the value to be appraised is the fair market value of the assets to plaintiff Raytheon Company in the present location of said assets at the Mountain View plant of plaintiff Raytheon Company as part of the operations of Raytheon Company",

the precise question is whether the District Judge erred in holding (R. Tr. 628) that

> "fair market value certainly contemplates under the authorities that recognition be given to the use to which the article is placed, and I can't conceive that these assets, valuable as they are or invaluable, should be regarded as something to be dumped on the loading dock and therein appraised when we find that Raytheon has a valid and substantial use thereof."

Raytheon states the question (Br. 42) as

> "whether 'fair market value' means the value of the selected items dismounted and ready for bids by any and all prospective purchasers, or whether it means the value of the items to Raytheon in place, installed and in operation."

This statement of alternatives disingenuously describes Raytheon's position (see p. 59 below) and incorrectly states defendants' and the Trial Court's. According to Raytheon (Br. 46) "The value to Raytheon of the 'B' list items is a false criterion." But the alternative to this position is not "the value of the items to Raytheon in place, installed, and in operation"—that would be a figure for the whole "B" list of the magnitude of $1,750,000, as Ellison testified (see p. 16, supra). The alternative is a value determined by giving consideration, as one of the elements, to the value to Raytheon at the present location in the Raytheon plant as part of Raytheon's operations. This is what the Trial Court held. Its statement in its oral opinion, quoted above, was its ruling.

The formal expression in the judgment of the ruling was drafted and submitted by Raytheon. After announcing its decision

in the foregoing words, the court ordered that "plaintiff [Raytheon] shall prepare findings of fact and conclusions of law consistent with this and prior orders" (R. 140). Raytheon then submitted as part of its proposed conclusion of law No. 3 (R. 142-148) this:

> "In making such appraisal the value to be appraised is the fair market value of the assets to Raytheon in their present location as part of Raytheon's operations" (R. 148).

Defendants accepted Raytheon's proposed Conclusion No. 3 without objection or suggestion for change (R. 163-164), and the court adopted Raytheon's very language for its conclusion (R. 164).

Raytheon may not, therefore, assign error to this expression of the court's ruling. The doctrine of "invited error" precludes it.[33] Consequently, the only question now available for Raytheon is whether the District Court erred in holding that, in determining

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33. It is elementary that "a party cannot successfully take advantage of asserted error committed by the court at his request", *Shumate v. Johnston Publishing Co.*, 139 C.A. 2d 121, 130, 293 P.2d 531 (1956).

"If it were error, appellants invited it", *Dietl v. Heisler*, 188 C.A. 2d 358, 369; 10 Cal. Rptr. 587 (1961).

For example, in *Tucker v. Cave Springs Min. Corp.*, 139 Cal. App. 213, 218, 33 P.2d 871 (1934), the court said:

> "As a final point appellant urges that the findings 'constitute a negative pregnant and are self destructive'. The findings of the trial court as signed and filed bear the caption, *'Proposed Substituted* Findings of Fact and Conclusions of Law.' Noting this in the clerk's transcript as transmitted to this court, the original file of the trial court was ordered produced for our inspection. It is apparent that the trial judge adopted as correct and signed the findings as *prepared and proposed by defendant,* which, as appellant, is now urging a reversal of the judgment because they are defective. The material issues raised by the pleadings are sufficiently covered by the court's findings, and appellant cannot complain at this time of defects for which it was responsible." [Italics are the court's]

Similarly, in *John B. Stetson Co. v. Stephen L. Stetson Co., Ltd.*, 133 F.2d 129 (2 Cir., 1943), the court said (p. 131):

> "We do not consider the restriction contained in paragraph 5 of the decree to be a departure from the intendment of our opinion and mandate. *Moreover, counsel frankly admitted that the form of pro-*

"fair market value", one element in the determination is the value of the assets to Raytheon in their present operation and location.

B. Discussion.

Raytheon argues that the value of the assets must be determined as if Raytheon had no use for the equipment, was not interested in buying it, had rejected it, ripped it out of the plant and placed it on the shipping dock for removal, and without regard to its value to the most *probable* customer with the most immediate need and as part of an assembled plant. It predicates this on the premise that if Raytheon did not buy the assets, its obligation was to place the equipment, dismounted, on the dock (Br. 45). But, in ascertaining what price Raytheon should *fairly* pay *on electing to* buy, one does not proceed on the basis that it has elected *not* to buy. It is still one of the prospective purchasers constituting the possible market. Its own presence and need are an element of the market and a most important one. Raytheon's phrasing that "fair market value" means "value * * * dismounted and ready for bids by any and *all* prospective purchasers" is internally inconsistent because "dismounting" presupposes the elimination of an important prospective purchaser, Raytheon itself.

As on the appeal from paragraph 1 of the judgment, the issue is one of interpretation of words as used by the parties in a contract, here "fair market value". The trial court interpreted the contract as not contemplating that price to Raytheon was

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posed decree submitted on behalf of appellant invited adoption of the language to which objection is now urged."

So also in *Omaha Hardwood Lbr. Co. v. J. H. Phipps Lumber Co.*, 135 F.2d 3, 10 (8 Cir. 1943):

"A party can hardly ask appellate relief from matters in a judgment which were included in his own requested findings and conclusions, without some satisfactory showing of excusable mistake, which he has first duly presented to the trial court."

to be calculated as if it were totally uninterested in the assets. That interpretation is sustained by the evidence, which includes: (1) The fact that Semiconductor had refused to sell these assets to Raytheon at 30% of book value, and (2) the fact that Raytheon found the equipment essential to its operations.

We agree with Raytheon that "fair market value" is what a willing buyer would pay and a willing seller accept, neither being under legal compulsion to buy or sell. But it is also elementary that special value to a particular buyer or prospective buyer is an element in the fair value. "Fair market value" is determined both (1) by eliminating *any* condition of a forced sale and (2) including

> "a value based on the *highest and best use of the property.*" *Pacific States Sav. & L. Co. v. Hise,* 25 C.2d 822, 839, 155 P. 2d 809 (1945).

Semiconductor cannot be put in a position of taking what it would have to take if compelled to sell, and Raytheon cannot escape paying a value based on the highest and best use of the property.

The accepted definition appears in *Sacramento, etc. R.R. Co. v. Heilbron,* 156 C. 408, 409, 104 Pac. 979 (1909):

> "the *highest price* estimated in terms of money which the land would bring if exposed for sale in the open market, with a reasonable time allowed in which to find a purchaser, buying with knowledge *of all of the uses and purposes to which it was adapted and for which it was capable.*"

This very definition has been called the "classic definition", *Joint Highway Dist. No. 9 v. Railroad Co.,* 128 Cal. App. 743, 755, 18 P.2d 413 (1933), and is often repeated, as in *Covina Union High School Dist. v. Jobe,* 174 C.A. 2d 340, 353, 345 P.2d 78 (1959), and *People v. Ricciardi,* 23 C.2d 390, 401, 144 P.2d 799 (1943), where it is said to be the definition of "universal acceptance". The opinion in the *Sacramento* case also states that market

value is "the *highest sum* which the property is worth to persons generally, purchasing in the open market in consideration of the land's *adaptability for* any *proven use.*"[34] The opinion also states (p. 412) that facts bearing on the use to which a building is particularly adapted are relevant. See also *People v. Ocean Shore Railroad*, 32 C.2d 406, 428, 196 P.2d 570 (1948) (market value is to be determined in view of *all* the uses to which it is adapted and available).

The leading case is *Boom Co. v. Patterson*, 98 U.S. 403 (1878) which points out that what gives "market value" is *capability* of use estimated by reference to *any and all uses* for which the property is suitable (p. 408). A value to a particular person arising from the peculiar fitness of the assets for the particular purposes of that person is an important element in estimating their fair market value (p. 409). Fair market value is to be determined with reference to "the value of the property for *the most advantageous uses* to which it may be applied" (p. 410).

In *Grand River Dam v. Grant-Hydro*, 335 U.S. 359 (1948) petitioner, a public corporation, condemned property of the defendant, a public utility, for a hydro-electric project. It was held that the value of the land for use as a power site by petitioner was to be taken into consideration. The court said (pp. 372, 373):

> "In a voluntary purchase of this land by the petitioner, as a willing purchaser, from the respondent, as a willing and unobligated seller, the value of it as a power site inevitably would have entered into the negotiated price."

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34. It is significant that Raytheon, while quoting from *Sacramento, etc. R.R. Co. v. Heilbron, supra,* (at Br. 43) omits everything in the first passage quoted above but the words "would bring if exposed for sale in the open market" and omits everything from the second passage above but the words "worth to persons generally, purchasing in the open market".

In view of Raytheon's technique portrayed at pp. 7, 8, supra, the following from *United States v. General Motors Corp.*, 323 U.S. 373 (1945) is apropos (p. 382):

> "It is altogether another matter when the Government does not take his entire interest, but by the form of its proceeding *chops it into bits*, of which it takes only what it wants, however few or minute, and leaves him holding the remainder, which may then be altogether useless to him, refusing to pay more than the 'market rental value' for the use of the chips so cut off. This is neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates."

Lewis on Eminent Domain (3d ed. 1909) Sec. 707 states:

> "The market value of property includes its value for any use to which it may be put. If, by reason of its surroundings, or its natural advantages, or its artificial improvements, or its intrinsic character, it is peculiarly adapted to some particular use, all the circumstances which make up this adaptability may be shown, and the fact of such adaptation may be taken into consideration in estimating the compensation." (p. 1233)
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> * * *
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> "* * * If it has a pecular adaptation for certain uses, this may be shown, and if such peculiar adaptation adds to its value the owner is entitled to the benefit of it." (p. 1238)

In *Southern California Edison Co., Ltd., et al. v. United States*, 117 Ct. Cl. 510 (1950) involving a claim of just compensation for the taking of two steam electric generating units, while the court said that it could not apply a market value test since such items were so infrequently bought and sold as to have no market, it said (p. 531):

> "Then, too, in arriving at just compensation, we cannot disregard the value of the two units as a part of a system any more than we could assume that the second-hand value of an elevator would be fair compensation for its removal from a building. Units 7 and 8, although used principally as re-

serve, were operating parts of a going utility. If we were to apply the market-value test, we should want to know, not merely their value as units detached from the plant, but also the market value of the whole system, or at least of the whole plant of which they were a part, before and after the taking."

Samuel M. Coombs, Jr., Trustee v. United States, 106 Ct. Cls. 462 (1946) involved a taking of essentially all the tools and equipment of a bankrupt plant manufacturing precision airplane parts. The court said:

"The Spier Aircraft Corporation had assembled tools and equipment and leased a building, all of which as a unit was especially suited and adapted to the making of certain airplane parts. This constituted a factory. The defendant, in awarding compensation, proceeded as though the articles comprising the factory did not in fact comprise a factory, but were isolated in storage, each article separate and distinct from the others. But when they were requisitioned they were not separate and distinct, but constituted a factory, especially adapted for the manufacture of airplane parts, and as so adapted, arranged, interrelated, and organized had a special value." (p. 475)

Arkansas Valley Railway Inc. v. United States, 107 Ct. Cls. 240 (1946) involved the taking of the rails, track fastenings and other metal track material of plaintiff's railroad. The court applied "as a basis fair market values" (p. 258) and rejected the government's contention (p. 256) that plaintiff is entitled only to the "detached value of the material taken".

Raytheon's citations.

Most of Raytheon's citations involve just compensation in eminent domain. Since the issue in the present case is one of interpretation of a contract, that body of law is relevant only by way of analogy, and on that basis we have cited eminent domain cases

above. But all rules in condemnation cases are not applicable, for condemnation cases can involve problems wholly peculiar to the situation of a sovereign.[35] Frequently the sovereign must have a particular property or forego a public project entirely, so that, if necessary, it might pay any amount, however exorbitant. Advantage of that necessity may not be taken. But unlike a condemnor in such a situation, Raytheon could buy in the open market, if it wished. It will be recalled (p. 16, supra) that Ellison testified to three values for the List B assets:

1. At one extreme a disruption value to Raytheon of $1,750,000.
2. At the other extreme a value of $400,000 to $500,000 in a lot sale to a speculator or liquidator.
3. In between, a value of $636,000 as a conservative fair market value.

If we were seeking $1,750,000 for the List B assets, or a proportionate amount for those portions of the Group 2 assets which Raytheon elected to buy,[36] some of the condemnation statements might be relevant. But we are not.

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35. Thus, *United States v. Miller,* 317 U.S. 369 (1943), cited by Raytheon, states that often in condemnation cases the criterion of market value is not applied; e.g.,

> "Again, strict adherence to the criterion of market value may involve inclusion of elements which, though they affect such value, must in fairness be eliminated in a condemnation case, as where the formula is attempted to be applied as between an owner who may not want to part with his land because of its special adaptability to his own use, and a taker who needs the land because of its peculiar fitness for the taker's purposes." (p. 375)

Pursuant to this view the Court rejected a settled California rule which allows market value, as inconsistent with a federal rule in condemnation cases (p. 379, bottom, page 380, top).

36. The situation as to the whole of the Group 2 assets is summed up in Finding 24, R. 163, that Ellison appraised the Group 2 assets "to be conservatively worth $91,200 disassembled, dismantled, removed from the plant acquired by Raytheon from Rheem Semiconductor and placed on the shipping dock at the plant but as *having a fair market value* in the range of the residual book values, viz., $337,126 if maintained for the continuing use for which they were installed at said plant."

On the other hand, *Baetjer v. United States,* 143 F.2d 391 (1 Cir.), cited by Raytheon,[37] points out (p. 396, 2d col.) that value due to strategic location of land is important as a factor influencing hypothetical bargainers. *One of the bargainers here is obviously Raytheon itself, and Raytheon's attempt to determine the worth of the property that it should pay as if Raytheon did not exist is the cardinal vice in its argument.*

Raytheon (Br. 46) cites *In re Alberti,* 41 F. Supp. 380 (S.D. Cal.) for a statement that "value in use to the owner is not a criterion of [market] value. Nor is value in use to the person who seeks to acquire the property." But *In re Alberti* supports us, not Raytheon. The court said (p. 381) that:

> "The law of California says specifically that while the highest use to which the property can be put is a criterion of value, no value can be determined solely by such use."

In other words, *the highest use to which the property can be put is a criterion of value.* The court in the *Alberti* case reversed a referee, not because he considered that use, but because he de-

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37. Raytheon cites this case for its application of the rule, peculiar to eminent domain, that the person from whom a piece of land is taken is not entitled to a special higher value than the land has to him alone by reason of its combination with other lands not taken. Nor may he recover "sentimental value" to himself, which is all that *Maher v. Commonwealth,* 291 Mass. 343, 197 N.E. 78 holds.

How far afield Raytheon goes—and with what accuracy—is illustrated by its citation of *Southern California Fishermen's Association v. United States,* 174 F.2d 739 (9 Cir. 1949). There the United States condemned land owned by the City of Los Angeles on which were certain improvements erected by the Fishermen's Association which claimed as recompense for the improvements their value as if attached to the land. Raytheon suavely describes this as a case where the improvements were maintained by the Association under city permits "revocable on 30 days' notice" (Br. 44). In fact the City had *already revoked* the permits before the United States sought to condemn, so that the Fishermen's Association no longer had any interest in the improvements as attached to the land, and the basis of evaluation in eminent domain cases "is not what the taker gained but rather that which the owner lost" (p. 740). This rule of eminent domain has no bearing in the present case.

termined market value on the basis of that use as the *sole* criterion and thereby reached a value *too* low, acting on opinion testimony based *solely* on "present yield" (p. 386), its income production as a farm in recent years (p. 384, 1st col.). Raytheon wishes to eliminate the element of use as any criterion whatever.

For the same reason the *Joint Highway* case, 128 Cal. App. 743, 18 P.2d 413, supports us and not Raytheon. There appellant, condemning part of a right of way of an abandoned railroad for use as a highway, appealed from an award based upon testimony which considered availability for transportation purposes. It contended that since the land was "too steep even to raise goats", it had only a nominal market value (p. 749). Affirming, the court not only repeated (p. 755) the universal definition of "fair market value" which we quote at p. 60, supra, but it said (p. 752):

> "It is apparent from what has been said that the property involved in this litigation was far better adapted for use for railroad or highway purposes than for any other purpose and that its value in use for such purposes was far greater than its value in use for any other purpose. Its use for such purpose was, therefore, what has been termed its 'highest available use'."

Raytheon's final argument (Br. 49, 50) consists of (a) a perverse distortion of Ellison's testimony in the teeth of the findings (see pp. 17, 25, supra)[38] and (b) Mr. Kather's version of the Kather-Stroup conversation of January 12th, which the trial court

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38. Raytheon asserts (Br. 49) that Mr. Ellison made a first appraisal, that Manufacturing "did not like the result" and that "instructions were hastily given to Ellison to produce another appraisal", that being "disappointed with the results of the 'fair market value' appraisal which it had ordered * * * it told Ellison to apply different standards". Not even the fact that counsel who wrote the brief was not trial counsel can excuse these statements.

rejected in favor of Mr. Stroup's version, a subject we discussed at page 14, supra.[39]

The common sense of the situation.

If Semiconductor were under no contractual compulsion to sell the assets to Raytheon, would it sell them to Raytheon at a price that gave no consideration at all to their value to Raytheon? Conversely, if Raytheon had no contractual right to compel the sale, would it fail to have its offer take cognizance of that value and run the risk that the equipment would go elsewhere? In canvassing the available market to determine possible buyers of the assets, would the existence of Raytheon itself be ignored? Since market price is the resultant of supply and demand, is an important element of demand to be eliminated from the equation? The answer to all these questions is obviously "no". Raytheon's chief executive in the premises testified that he believed at the time that it would be contrary to Raytheon's best interests to purchase the items elsewhere instead of from Semiconductor (R. Tr. 112, 113) "because [he] felt that [he] could not buy this equipment on the open market for as little as [he] could get it from Rheem Semiconductor" (R. Tr. 113).

Furthermore, the need of Raytheon in its operations where located is patently an important element that would enter into the

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39. Stroup added to his statement of willingness to defer Manufacturing's offer the condition that Raytheon was not to rush in meanwhile with a notice of election to buy assets (R. Tr. 524). Raytheon's brief (pp. 49-50) distorts this by arguing that this was an unfair proviso, that it amounted to a request of Raytheon to give up the right granted by Section 12 of the lease to buy List B assets at a value to be appraised. It was, however, no such thing. Once Manufacturing made its offer, Raytheon would have only a right of first refusal. Raytheon had not seen fit to exercise its right to buy at an appraised value up to that time, and Mr. Stroup was merely saying that now that Raytheon was being told by Manufacturing that Manufacturing intended to make an offer, it was only fair that while it was deferring doing so in order to give Raytheon a chance to make up its mind, Raytheon should not rush in with a notice that would cut off Manufacturing's offer.

calculations of a third party, e.g., a used equipment dealer, in determining what it might bid on equipment, if not already committed to Raytheon, for Raytheon itself would be a prospective customer for resale. The purpose of the option to Raytheon was not to immunize it from competition factors in determining the price at which it could buy—not to permit it to "steal" the assets—but merely to give it priority of right to purchase with an appraisal serving the function of competition.

We submit that the District Court's determination is correct and should be affirmed.

III.

ANSWER TO RAYTHEON'S DISCUSSION OF MOOT OR FALSE ISSUES.

A. Reductions from the Purchase Price.

1. As noted (p. 27), Raytheon's notice of appeal purports to appeal from "so much of paragraph 2 of the judgment as provides that the price of $531,584 became payable * * * without further providing for crediting against said price" rentals paid and to be paid. This is not an appeal from something the judgment provided but from a supposed omission, and it raises a non-existent issue. Nothing in the judgment denies Raytheon's right to so apply rentals. Our cross-appeal challenges the adjudication that Raytheon exercised the right of first refusal, and, if we are correct in that submission, the point Raytheon here makes is moot. On the other hand, if our submission on the cross-appeal is incorrect, we do not deny the right to apply rentals. We so advised Raytheon's counsel on receipt of the notice of appeal. The judgment said nothing on the subject, one way or the other, because in a suit for declaratory relief—as this was—the court passes only on the issues in controversy, and no controversy existed or was pleaded by anyone as respects the right to apply rentals *if* the right of first refusal had been exercised. Moreover,

although Raytheon proposed findings and conclusions (R. 142-148) and filed objections to the proposed findings and conclusions submitted by defendants (R. 155-156), it never suggested any provision about application of rentals. If Raytheon's new counsel had any question about the meaning of the judgment on this score, they should have applied to the District Court under paragraph 4 of its judgment which reserved jurisdiction to resolve any further controversies that might arise in the application of the judgment, rather than trouble this Court with a non-existent issue.

2. Raytheon's brief (at p. 41) contains one paragraph asserting that "incidentally" the judgment erred in failing to provide for reduction of the purchase price for any assets which should prove undeliverable. *But its notice of appeal did not appeal from any such omission.* Moreover, there was no contention or evidence offered at the trial that any of the assets were missing. Raytheon had been in possession of the plant for nearly 6 months at the time of trial and, if any of the equipment was missing, should have known and introduced evidence thereof. The findings and conclusions were not signed until June 4, 1962 (R. 164) or the judgment until June 11, 1962 (R. 168), all after the June 1st date when the assets were deliverable under Manufacturing's offer. Raytheon prepared proposed findings and conclusions (R. 142) and objections to defendant's counterdraft as late as May 28th (R. 155, 156) and made no suggestion of missing assets or of any facts supporting a price reduction.

B. Appeal from Paragraph 4 of the Judgment Relative to Reservation of Power to Substitute Appraiser.

This matter, argued by Raytheon (at p. 51 of its brief) is moot (as well as a false issue) because defendants have accepted American Appraisal Company. Raytheon and Semiconductor have already submitted to it the appraisal of the Group 2 assets, and its appraisal has been made and reported, although Raytheon

has declined to abide by that appraisal pending its appeal from paragraph 3 of the judgment.[40]

Argument of Rheem Manufacturing Company and Rheem Semiconductor Corporation As Appellants on Cross-Appeal

I. The Facts.

The underlying facts are stated at pages 18, 20, 21 above. Manufacturing and Semiconductor appealed (R. 171) only from paragraph 2 of the judgment which adjudged (R. 166):

> "The notice given by plaintiff Raytheon Company to defendant Rheem Semiconductor Corporation by letter of February 2, 1962 (a copy of which is attached to the complaint herein as Exhibit 7), * * * was a sufficient exercise of its right of first refusal with respect to the items included in the said offer from defendant Rheem Manufacturing Company to defendant Rheem Semiconductor Corporation, and gave

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40. The provision in paragraph 4 was a perfectly valid one. It did not disqualify American Appraisal Co. but simply reserved jurisdiction to entertain an application to hear and determine whether good cause for disqualifiation existed. Courts of equity have inherent power to mold their decrees to the exigencies of the case. *Hecht v. Bowles,* 321 U.S. 321, 329. Independently of statute or directions in a trust instrument, a court has jurisdiction to supplant an unsuitable trustee, once jurisdiction of the trust is given to it. 4 Pomeroy's Equity Jurisprudence (5th ed.) § 1086, p. 256; *Boone v. Wachovia Bank etc. Co.,* 163 F.2d 809, 814 (D.C. Cir.) A court may supplant an arbitrator appointed by a party once its jurisdiction to enforce arbitration is invoked. *Cathcart v. Security Title Ins. etc Co.,* 66 C.A. 2d 469, 152 P.2d 336, and, of course, the provision for an appraiser was one for arbitration of value, the appraiser thus being an arbitrator. The jurisdiction of a court of equity having been invoked over an aspect of arbitration, it could reserve jurisdiction to do whatever became appropriate for proper execution of its judgment.

rise to a valid binding contract between plaintiff Raytheon Company and defendant Rheem Semiconductor Corporation whereby said defendant Rheem Semiconductor Corporation became bound to sell and plaintiff Raytheon Company became bound to buy said assets for $531,584, payable by February 17, 1962, and, in consequence, title to said assets covered by said offer vested in plaintiff Raytheon Company on February 2, 1962."

II. The Issue: A Pure Question of Law.

Raytheon based its claim that it had exercised its right of first refusal *solely* on its letter of February 2, 1962 (R. 112), and said that it had no other evidence of exercise (R. Tr. 27:17; R. Tr. 28:16). The question is the elementary contract question of "offer and acceptance". Semiconductor's letter to Raytheon of January 26, 1962 (Exhibit 5 to the complaint, R. 106), which notified Raytheon of Manufacturing's offer, was, of course, an offer to sell the assets to Raytheon for $531,584. The terms of the offer were:

> "* * * you shall have the period of time specified therein [in Section 12 of the lease, i.e., 5 days] to purchase all of the items covered by such offer at the price specified above [i.e., $531,584] * * *." (R. 106, 107).

The sole question on the cross-appeal is : Was this offer accepted by Raytheon's letter of February 2, 1962? Whether a writing constitutes an acceptance, so as to create a contract, is a pure question of law to be decided by an appellate court unfettered by the determination of the trial court. *Wristen v. Bowles,* 82 Cal. 84, 22 Pac. 1136; *Rothstein v. Edwards,* 94 F.2d 488 (9 Cir. 1937); *Philip Wolf & Co. v. King & Starrett,* 1 Cal. App. 749, 82 Pac. 1055. Thus, unlike the issues raised by Raytheon's appeal, the issue on the cross-appeal is purely a question of law.[1]

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1. Defendants so submitted from the outset of the litigation (R. Tr. 46, proceedings at first hearing; R. Tr. 28, 29).

III. Discussion: Raytheon's Letter Was Not an Unqualified acceptance but a Rejection Asserting That the Offer Was a Nullity

Raytheon's letter in full text is this (R. 112):

> "Reference is made to the Lease Agreement dated November 30, 1961 between Rheem Semiconductor Corporation and Raytheon Company and particularly to Paragraph 12 of said Lease Agreement.
>
> "Raytheon Company hereby notifies you that it unconditionally makes the election and exercises its rights pursuant to said Paragraph 12 to purchase the items of equipment listed on Exhibit 'A' attached hereto.
>
> *It is necessary that the price of the items hereby purchased be determined. As you know, it is our position that no bona fide offer has been received by you for any of the items listed and that the price will be determined pursuant to other provisions of the agreement."*

The sentence beginning "As you know" is a reference to Raytheon's letter to Semiconductor of January 23, 1962 (Ex. 4 to Complaint, R. 104), wherein Raytheon said:

> "such notice is *of no effect* in that an offer by your parent cannot be treated as a 'bona fide offer' * * *."

California law controls the question, and Cal. Civ. Code § 1585 states:

> "Acceptance must be absolute. An acceptance must be absolute and unqualified, or must include in itself an acceptance of that character which the proposer can separate from the rest, and which will conclude[2] the person accepting. A qualified acceptance is a new proposal."

In short, the question is whether Raytheon's letter of February 2, 1962 was an absolute and unqualified acceptance of an offer to sell for $531,584.00, i.e., an absolute and unqualified consent to pay that sum.

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2. Deering's 1961 one volume unannotated edition of the Civil Code erroneously has "include". The correct word is "conclude".

We submit that it was obviously not. It asserted that *Manufacturing's offer was a nullity, and that there was no obligation to meet the price of $531,584* in order to acquire the assets. To be sure, it asserted that it was exercising a right to buy, but the right *it presumed* to exercise was a non-existent right to buy under the other provisions of Section 12, applicable only where no offer from another had been received,—the provisions under which Raytheon could elect to buy, absent an agreement on price, at 90% of book value or at a price appraised by American Appraisal Co., whichever was lower. But Raytheon did not have the kind of right it so sought to exercise because, as the District Court adjudged, Manufacturing's offer was a valid one. Raytheon's letter plainly said that the price it was willing to pay was one which it was *"necessary"* to *"be determined"* and that "the price *will be* determined pursuant to other provisions of the agreement". This was not a consent to pay $531,584, without which there was no exercise of the right of first refusal.

The gist of Raytheon's argument below was that by this letter Raytheon said, "We will unconditionally buy the assets and we will pay $531,584 *if, as the result of litigation,* a court holds that we have to." But an acceptance qualified by the condition that the other party must first litigate and win a lawsuit clear through the Court of Appeals cannot rationally be called "absolute or unqualified". It is not an acceptance that, in the language of Civil Code § 1585, "concludes" the acceptor, for it makes clear that he is not willing to be concluded without losing a lawsuit.

Raytheon characterized the meaning of its letter of February 2, 1962 in the following colloquy at the first hearing in this case (on application for a temporary injunction) (R. Tr. 661):

> "THE COURT: What are you willing to pay for the assets?
>
> "MR. WHEAT: Whatever the option works out to. We don't know what the figure is. We are willing to pay what the parent company has offered, if their offer is bona fide. We don't know whether it is bona fide.

"MR. LASKY: Apart from the question of bona fides of that offer, *is Raytheon willing to match that offer of five hundred and thirty-odd thousand? Now?*

"MR. WHEAT: *If* the offer is held by the Court to be bona fide, unqualifiedly yes. *But we are not willing to pay that offer if it is what we think it is, simply a commercial gimmick.*"

We submit that it defies reason to call this an unqualified acceptance.

This Court's decision in *United States v. T. W. Corder, Inc.*, 208 F.2d 411 (9 Cir., 1953) is exactly in point. There T. W. Corder, Inc. leased a lot and building to the United States with an option to the lessee "to purchase the leased premises at not to exceed $75,000." (p. 411). During the term of the lease the lessee sent a telegram to the lessor reading (p. 412):

> " 'The United States of America by this notice elects to and hereby does accept the option to purchase the Corder Building in the City of Oakland, County of Alameda, State of California, and the land site thereof described * * * [description omitted]. The option hereby accepted is contained in lease contract [identification of the lease here omitted]. Upon receipt of confirmation letter which follows, kindly advise this office the least sum of money you will accept for conveyance of fee title of the above described property (11 CBA)' ".

In answer to the Government's request for advice of the minimum price for the property, the lessor stated that it would "positively accept no less than $75,000.00 net to us" (p. 412). The Government then claimed that it had overpaid 3 days' rent. The lessor successfully sued for nonpayment of rent and to terminate the lease. The Government then sued to condemn the property and claimed that the price should be $75,000 under its option. A judgment for $95,000 as the fair market value was affirmed, this Court saying (p. 413):

"The option price was not to exceed $75,000.00, but at no time did the Government unequivocably offer to purchase the property in accordance with its terms. The telegram of June 27, 1947, was not an acceptance of the option but was mere notice that the Government wished to exercise its option and a request that appellee advise it of the lowest price appellee would accept for the property. Appellee notified the Government that it would accept no less than $75,000.00. From the stipulation it clearly appears that the Government never made an unconditional offer to pay $75,000.00 for the property. It at all times insisted that it had the right to deduct the alleged overpayment of three days rent. As a result of the failure to exercise the option in acordance with its terms no bilateral contract for the purchase of the property came into existence. To exercise an option the notice thereof 'must be unconditional and in exact accord with the terms of the option.' 1 Corbin on Contracts, § 264, p. 879; Colyear v. Tobriner, 1936, 7 Cal. 2d 735, 62 P.2d 741, 109 A.L.R. 191. The Government was at no time bound by its conditional acceptance of the option and appellee was not bound because the option had not been exercised."

The last passage in this quotation poses a testing question. Raytheon's own official testified that technology in electronics manufacturing changes so rapidly that equipment could become obsolete quickly (R. Tr. 193). Suppose the equipment in controversy had become outmoded and valueless, and Semiconductor were suing Raytheon and contending that by its letter Raytheon had bound itself to buy it for $531,500. Could Semiconductor successfully contend that there was such a contract? The answer, we submit, is obviously "no".

In *Colyear v. Tobriner,* 7 C.2d 735, 62 P.2d 741 (1936), a lease contained an option to renew at a rental not to exceed a 20% increase. The lessee wrote to the owner's agent that (p. 738) "it is our intention, and you may consider this a notice,

that we will exercise our option * * *." Three days later the lessee wrote again (p. 738):

> " 'This will be a notice that we will renew the lease by exercising our option on the expiration date, May the 9th, and we assume the monthly rental will remain the same, as conditions do not warrant any change, as I think you will agree.' "

The owner refused this offer to pay the same rental and demanded the 20% increase. The court held that the option had not been exercised, because, although the lessee in both letters stated that he exercised the option, the second letter "is qualified by this statement: 'We assume the monthly rental will remain the same, as conditions do not warrant any change, as I think you will agree.' " (p. 739)

In *Hayward Lbr. & Inv. Co. v. Const. Prod. Corp.*, 117 C.A. 2d 221, 255 P.2d 473 (1953), the court said that to avail himself of an option,

> "tenant must apprise the lessor in unequivocal terms of his unqualified intention to exercise his option in the precise terms permitted by the lease." (p. 227, 228)
>
> "* * * An option is an offer by which a promisor binds himself in advance to make a contract if the optionee accepts upon the terms and within the time designated in the option. Since the optionor is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option." (p. 229)

In *Jones v. Moncrief-Cook Co.*, 250 Okl. 856, 108 Pac. 403, involving an option to the lessee to buy the property "at the price offered by any other purchaser", lessor received an offer of $3100 and advised the lessee by telegram. The lessee replied by letter (108 Pac. 404, 405). It expressed surprise that such a price had been offered, added "of course we may be able to

make some arrangements with you for the purchase of the lot," asked for the lessor's "best terms of payment" by return mail and argued that for several reasons a payment of $2800 or less by the lessee would net the lessor as much as a payment of $3100 by a third party. It concluded: "Kindly advise us if you could take something like $500.00 or $800.00 down, the balance in 3 installments of one, two and three years each. If you could make us a good proposition, we might be able to handle the deal for you. As said above we will take the matter up with our partners, by which time we hope to again hear from you.'" Four days later the lessee wired the lessor that it would pay the $3100. It was held that lessee's first letter "amounted to a refusal to purchase at the price offered, to wit, $3,100", because a "counter offer amounts to a rejection under the option of the terms proposed, being an effort to make a new contract" (108 Pac. 40) and because the optionee should not be "permitted to carry on a system of diplomatic correspondence with the lessor." (p. 406).

IV. The Relief to which Cross Appellants Are Entitled.

Since Raytheon did not exercise its right of first refusal, it had no right to buy the assets, and its retention of possession after the end of the lease term has been a wrongful conversion, effected as of June 1, 1962. Cal. Civ. Code § 3336 provides:

> "The detriment caused by the wrongful conversion of personal property is presumed to be:
>
> "First—The value of the property at the time of the conversion, with the interest from that time, or, an amount sufficient to indemnify the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of and which a proper degree of prudence on his part would not have averted; and
>
> "Second—A fair compensation for the time and money properly expended in pursuit of the property."

Manufacturing, the purchaser and owner of the property, is therefore entitled to damages for its value as of June 1, 1962, plus interest from that time plus fair compensation for the time and money expended in pursuit of the property. Paragraph 2 of the judgment should therefore be reversed with directions to the District Court to determine and award judgment for the amount of these damages.

CONCLUSION

We respectfully submit that those portions of the judgment from which Raytheon appeals should be affirmed, and that paragraph 2 of the judgment should be reversed with directions to the District Court as just suggested above.

Dated: San Francisco, California, February 21, 1963.

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I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Moses Lasky